DOCUMENT RESUME

ED 417 565 EC 306 312

TITLE	Due Process Hearing Officer Manual.
INSTITUTION	Arizona State Dept. of Education, Phoenix. Exceptional Student Services.
PUB DATE	1998-03-00
NOTE	647p.
PUB TYPE	Books (010) -- Guides - Non-Classroom (055)
EDRS PRICE	MF03/PC26 Plus Postage.
DESCRIPTORS	Confidentiality; *Court Litigation; *Disabilities; *Due Process; Educational Legislation; Elementary Secondary Education; *Federal Legislation; *Hearings; Special Education; State Legislation; *Student Rights
IDENTIFIERS	Amendments; Arizona; Education Amendments 1974; *Individuals with Disabilities Education Act; Individuals with Disabilities Education Act Amend; Individuals with Disabilities Education Act Part B; Rehabilitation Act 1973 (Section 504)

ABSTRACT

Designed for special education due process hearing officers in Arizona, this manual is intended to provide a reference system for accessing and understanding state and federal laws, regulations, case-law, and policy with respect to the education of students with disabilities. Sections of the manual include: (1) a glossary of terms and a chart that outlines the steps of the special education process; (2) an outline of the new statutory changes in the Individuals with Disabilities Education Act (IDEA) reauthorized in 1997; (3) procedural issues in due process hearings; (4) the relationship between Section 504, the IDEA, the Americans with Disabilities Act, and regular education; (5) guidelines for conducting a due process hearing, including a pre-hearing conference checklist and questions and answers on hearings; (6) how to write findings of fact and conclusions of law; (7) IDEA legislative language; (8) IDEA 1993 federal regulations for Part B; (9) questions and answers on Individualized Education Programs; (10) Arizona revised statues relating to special education; (11) federal regulations for the Family Education Rights and Privacy Act; (12) federal regulations concerning education under Section 504 of the Rehabilitation Act; (13) special education court cases; and (14) sample letters and forms. (CR)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

EC

Arizona Department of Education

Exceptional Student Services

ED 417 565

DUE PROCESS HEARING OFFICER MANUAL

GREAT SEAL OF THE STATE OF ARIZONA

1912

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☑ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

MARCH 1998

BEST COPY AVAILABLE

EC306312

ARIZONA SPECIAL EDUCATION DUE PROCESS

HEARING OFFICER MANUAL

March 1998

Arizona Department of Education
Exceptional Student Services
1535 West Jefferson Street
Phoenix, Arizona 85007
(602) 542-3084

TABLE of CONTENTS
Arizona Special Education Due Process Hearing Officer Manual

INTRODUCTION .... A

GLOSSARY OF TERMS .... B

SPECIAL EDUCATION LAW C

PROCEDURAL ISSUES .... D

SECTION 504 - I.D.E.A. - A.D.A. .... E

GUIDELINES FOR CONDUCTING A DUE PROCESS HEARING .... F

I.D.E.A. STATUTES.......... G

I.D.E.A. REGULATIONS .... H

APPENDIX C TO I.D.E.A. REGULATIONS- IEPS.......... I

AZ REVISED STATUTES - SPECIAL EDUCATION.......... J

FAMILY EDUCATION RIGHTS & PRIVACY ACT (F.E.R.P.A.) .... K

SECTION 504 OF THE REHABILITATION ACT L

SPECIAL EDUCATION COURT CASES .... M

ADE FORMS AND PROCEDURES .... N

Section A

INTRODUCTION

INTRODUCTION

This Manual has been prepared for the Arizona Department of Education, for the purpose of facilitating the implementation of the Impartial Due Process Hearing requirements of the Individuals With Disabilities Education Act (IDEA), as well as the State requirements.

The primary users of this manual are Special Education Due Process Hearing Officers, who are assigned to serve as Hearing Officers in special education hearings under state and federal laws. The manual is intended to provide a reference system for accessing and understanding state and federal laws, regulations, case-law and policy with respect to the education of students with disabilities.

BEST COPY AVAILABLE

Section B

GLOSSARY OF TERMS

Glossary of Terms and Acronyms

Adaptive Behavior - The effectiveness with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group.

Appropriate educational program - Personalized instruction with sufficient support services to permit the child to benefit educationally from instruction.

Assistive technology device - Means any item, piece of equipment or product system, whether acquired commercially off the shelf, modified or customized, that is used to increase, maintain or improve functional capabilities of individuals with disabilities.

Assistive technology service - Means any service that directly assists an individual with a disability in the selection, acquisition or use of an assistive technology device. The term includes:

a) the evaluation of the needs of an individual with a disability, including a functional evaluation of the individual in the individual's customary environment;

b) purchasing, leasing or otherwise providing for the acquisition of assistive technology devices by individuals with disabilities;

c) selecting, designing, fitting, customizing, adapting, applying, retaining, repairing or replacing of assistive technology devices;

d) coordinating and using other therapies, interventions or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

e) training or technical assistance for an individual with a disability, or when appropriate, that individual's family; and

f) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers or other individuals who provide services to employ, or are otherwise substantially involved in the major life functions of individuals with disabilities.

Autism - Means a developmental disability that significantly affects verbal and nonverbal communication and social interaction, that is generally evident before the age of three and that adversely affects educational performance. Characteristics include irregularities and impairments in communication, engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines and unusual responses to sensory experiences. Autism does not include children with characteristics of emotional disability as defined in this section.

Child with a disability - Means a child who is at least three but less than twenty-two years of age, who has been evaluated pursuant to section 15-766 and found to have at least one of the following conditions and who, because of the condition, needs special education and related services:

(a) Autism.
(b) Emotional disability.
(c) Hearing impairment.
(d) Other health impairments.
(e) Specific learning disability.
(f) Mild, moderate or severe mental retardation.
(g) Multiple disabilities.
(h) Multiple disabilities with severe sensory impairment.
(i) Orthopedic impairment.
(j) Preschool moderate.
(k) Preschool severe delay.
(l) Preschool speech/language delay.
(m) Speech/language impairment.
(n) Traumatic brain injury.
(o) Visual impairment.

Counseling services - Means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

Days - Calendar days unless specified otherwise.

Educational disadvantage - Means a condition which has limited a child's opportunity for educational experience resulting in a child achieving less than a normal level of learning development.

Emotional disability -

(a) Means a condition whereby a child exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affects the child's performance in the educational environment:

(i) An inability to learn which cannot be explained by intellectual, sensory or health factors.
(ii) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
(iii) Inappropriate types of behavior or feelings under normal circumstances.
(iv) A general pervasive mood of unhappiness or depression.
(v) A tendency to develop physical symptoms or fears associated with personal or school problems.

(b) Includes children who are schizophrenic but does not include children who are socially maladjusted unless they are also determined to have an emotional disability as determined by evaluation as provided in § 15-766.

Evaluator - Means a qualified person in a field relevant to the child's handicap who administers specific and individualized assessments for the purpose of possible special education placement.

Exceptional child - Means a gifted child or a child with a disability.

Gifted child - Means a child who is of lawful school age, who due to superior intellect or advanced learning ability, or both, is not afforded an opportunity for otherwise attainable progress and development in regular classroom instruction and who needs special instruction or special ancillary services, or both, to achieve at levels commensurate with his intellect and ability.

Hearing handicapped - Means a hearing impairment, as determined by evaluation pursuant to § 15-766, which interferes with the child's performance in the educational environment and requires the provision of special education and related services.

Independent comprehensive evaluation - Means a comprehensive evaluation conducted by a qualified examiner who is not employed by the LEA or SSI responsible for the education of the child in question.

Individualized education program - Means a written statement for providing special education services to a child with a disability that includes the pupil's present levels of educational performance, the annual goals and the short-term measurable objectives for evaluating progress toward those goals and the specific special education and related services to be provided.

Individualized education program meeting - Means a meeting held to develop, review or revise a handicapped child's individualized education program (IEP).

Individualized education program team - Means a team of persons who are knowledgeable about the child, including the parent, and whose task is to write an appropriate educational program for the child, based on the evaluation results.

Mediation - Means an informal problem-solving process for parents and schools to resolve their differences concerning special education programs through the intervention of a neutral person knowledgeable in matters of special education.

Mental retardation - Means a significant impairment of general intellectual functioning that exists concurrently with deficits in adaptive behavior and that adversely affects the child's performance in the educational environment.

Multidisciplinary evaluation team - Means a team of persons, including at least a teacher or other specialist with knowledge in the area of the suspected disability, that determines whether a child is eligible for special education based on evaluation results.

Multiple disabilities - Means learning and developmental problems resulting from multiple disabilities as determined by evaluation pursuant to § 15-766, and who cannot be provided for adequately in a program designed to meet the needs of children with less complex disabilities. Multiple disabilities include any of the following conditions that require the provision of special education and related services:

(a) Two or more of the following conditions:

- (i) Hearing impairment.
- (ii) Orthopedic impairment.
- (iii) Moderate mental retardation.
- (iv) Visual impairment.

(b) A child with a disability listed in subdivision (a) of this paragraph existing concurrently with a condition of mild mental retardation, emotional disability or specific learning disability.

Multiple disabilities with severe sensory impairment - Means multiple disabilities that include at least one of the following:

(a) Severe visual impairment or severe hearing impairment.

(b) Severe visual impairment and severe hearing impairment.

Orthopedic impairment - Means one or more severe orthopedic impairments and includes those that are caused by congenital anomaly, disease and other causes, such as amputation or cerebral palsy, and that adversely affect a child's performance in the educational environment.

Other health impairments - Means limited strength, vitality or alertness due to chronic or acute health problems which adversely affect a pupil's educational performance.

Parent - Means the natural or adoptive parent of a child, the legal guardian of a child, a relative with whom a child resides and who is acting as the parent of that child, a surrogate parent who has been appointed for a child pursuant to § 15-763.01 or a person who has a power of attorney to act on behalf of the natural parent of a child in educational decisions. Parent does not mean this state if the child is a ward of the state.

Preschool child - Means a child who is at least three years of age but who has not reached the required age for kindergarten, subject to § 15-771, subsection F.

Public agency - Means the state educational agency, local educational agencies, intermediate educational units as defined in 34 CFR 300.7, and any other political subdivision of the state which is responsible for providing education to handicapped children. Section 34 CFR 300.7, July 1, 1985 ed., is incorporated by reference and on file with the office of the Secretary of State.

Public expense - Means that the LEA or SSI either pays for the full cost of the comprehensive evaluation or ensures that the comprehensive evaluation is otherwise provided at no cost to the parent.

Recoupment - The ability to regain or recover the level of skills attained prior to interruption of programming.

Regression - A reversion to a lower level of functioning, as evidenced by a decrease in the performance level of previously attained skills which occurs as a result of an interruption in educational programming.

Related services - Those supportive services which are required to assist a child with a disability to benefit from special education. It is important to understand that if a child does education there can be no "related services" since a "related service" must be necessary for a child to benefit from special education.

Screening - A brief procedure for identifying children who should receive a more comprehensive assessment, and may include informal, non-standardized procedures or formal, standardized procedures.

Socially maladjusted - Means a person who chooses the inappropriate behavior in the nature of an antisocial behavior, a behavior disorder, or a conduct disorder which is exhibited to reach a goal.

Special education - Means the adjustment of the environmental factors, modification of the course of study and adaptation of teaching methods, materials and techniques to provide educationally for those children who are gifted or disabled to such an extent that they do not profit from the regular course of study or need special education in order to receive educational benefit. Difficulty in writing, speaking or understanding the English language due to an environmental background wherein a language other than English is spoken primarily or exclusively shall not be considered a disability that requires special education.

Special education referral - Means a written request for an evaluation to determine whether a pupil is eligible for special education services that, for referrals not initiated by a parent, includes documentation of appropriate efforts to educate the pupil in the regular education program.

Special education teacher - Means a person holding a certificate from the Arizona State Board of Education issues pursuant to R7-2-603 (F).

Specific learning disability - Means a specific learning disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations The term includes such conditions as perceptual disabilities, minimal brain dysfunction, dyslexia and aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, motor, or emotional disabilities, of mental retardation or of environmental, cultural or economic disadvantage.

Speech/language impairment - Means a child who has a communication disorder such as stuttering, impaired articulation, severe disorders of syntax, semantics or vocabulary, or functional language skills, or a voice impairment, as determined by evaluation pursuant to § 15-766, to the extent that it calls attention to itself, interferes with communication or causes the child to be maladjusted.

Stay Put - Provision which requires the child to remain in present program during due process proceedings unless a different placement is agreed to by the parents and the district.

Surrogate parent - A person of the age of majority appointed to serve as the parent in educational matters affecting the student who is a ward of the state or court, or whose parents' whereabouts can not be located, or whose parent is unavailable.

Teacher - Means a regular classroom teacher or a special education teacher.

Transition Services - Means a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living or community participation.

Traumatic brain injury - Means an acquired injury to the brain that is caused by an external physical force that results in total or partial functional disability or psychosocial impairment, or both, that adversely affects educational performance. The term applies to open or closed head injuries resulting in mild, moderate or severe impairments in one or more areas, including cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem solving, sensory, perceptual and motor abilities, psychosocial behavior, physical functions, information processing and speech. The term does not include brain injuries that are congenital or degenerative or brain injuries induced by birth trauma.

Visually impaired - Means a visual impairment, as determined by evaluation pursuant to § 15-766, that interferes with the child's performance in the educational environment and that requires the provision of special education and related services.

CFR
Code of Federal Regulations.

CSPD
Comprehensive System of Personnel Development.

EDGAR
Education Department General Administrative Regulations.

ESY
Extended School Year.

FAPE
Free Appropriate Public Education.

FERPA
Family Education Rights and Privacy Act.

IDEA
Individuals With Disabilities Education Act.

IEE

Independent Education Evaluation

IEP

Individual Educational Program. Written statements, developed by the IEP team translating child assessment information into a practical plan for specially designed instruction and delivery of services.

IFSP

Individual Family Service Plan. Required by P.L. 99-457 under Part H for infants and toddlers receiving early intervention services; the idea combines the IEP notion of planning with the idea that the family is critical to infant development.

IHO

Impartial Hearing Officer.

LEA

Local Education Agency. Refers to an administrative unit, or district, or Board of Cooperative Educational Services responsible for providing special education.

LEA - A

Local Education Agency A. Means public school districts as defined in A.R.S. § 15-101 and county accommodation schools.

LEP

Limited English Proficiency. Means having a low level of skill in comprehending, speaking, reading or writing the English language because of being from an environment in which another language is spoken.

LRE

Least Restrictive Environment.

MDC

Multidisciplinary conference. Means a meeting following the child's comprehensive evaluation, involving a group of knowledgeable persons, including the parent where the results of the comprehensive evaluation are discussed and eligibility for special education is determined.

OCR

Office for Civil Rights. Office of the US Department of Education, has regional offices, responsible for complaint investigations under Section 504.

OSEP

Office of Special Education Programs, of the US Department of Education, responsible for administering the IDEA.

OSERS

Office of Special Education and Rehabilitative Services.

OT
Occupational Therapy.

PE
Physical Education.

PLH
Primary language of the home. Means the language identified as the home language on the school enrollment form and the home language survey prescribed by A.R.S. § 15-753.

PT
Physical Therapy.

SEA
State Educational Agency. Refers to the State Department of Education, Special Education Services Unit.

SLD
Specific Learning Disabilities

SSI
State supported institution. Means any state department, agency or other state entity operating a school or receiving state or federal special education funds. This includes the Arizona State Hospital, the Arizona Department of Corrections, the Arizona State School for the Deaf and the Blind, and the Division of Developmental Disabilities of the Arizona Department of Economic Security.

TBI
Traumatic Brain Injury

SPECIAL EDUCATION PROCESS

1. Child Find/Identification

A. Locate
B. Conduct Screening
C. Document Interventions
D. Make Referral

2. Initial Evaluation and Eligibility Determination

A. Prior Written Notice /Procedural Safeguards Notice
B. Parent Consent
C. Conduct Evaluation
D. Eligibility Determination/ MET Report

3. IEP Development

A. Meeting Notice/ Procedural Safeguards Notice
B. IEP Documentation
C. LRE Determination

4. Initial Placement

A. Determine Placement
B. Prior Written Notice
C. Parent Consent

5. IEP Implementation in the Least Restrictive Environment

6. Review and Revision of IEP

A. Meeting Notice/PSN
B. IEP Document
C. LRE Determination
D. Prior Written Notice

7. Reevaluation and Determination of Eligibility

Provide Meeting Notice and Procedural Safeguards Notice

Review of Existing Data by IEP Team

A. No Additional Data	A. Additional Data Needed
B. MET Report and Determine Continued Eligibility	B. Prior Written Notice
C. Prior Written Notice	C. Obtain Parent Consent
	D. Conduct Evaluation
	E. Determine Eligibility/MET Report
Repeat Steps 6 and 5	*Repeat Steps 6 and 5*

8. Program Termination

A. Prior Written Notice
B. Procedural Safeguards Notice
C. Parent Consent
D. Re-Evaluation

SPECIAL EDUCATION PROCESS

The Individuals with Disabilities Education Act of 1997 (P. L. 105.17) Section 612 (a)(1-3) requires that all individuals with disabilities aged 3 through 21 in public and private (including religiously-affiliated) elementary and secondary schools, who are in need of special education and related services, are identified, located and evaluated. Parts B and C require that children with disabilities birth through age 2 who are in need of early intervention services are identified, located and evaluated.

(Section 300. Citations reflect proposed federal regulations-10/22/97)

"**Special education**" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. (Section 300.24)

"Related services," means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education. (Section 300.22)

"Free Appropriate Public Education" (FAPE) means special education and related services that are provided at public expense, under supervision and direction, and without charge; and are provided in conformity with the Individualized Education Program, including students with disabilities who are suspended and/or expelled. (Sections 300.340-300.351)

STEP 1. CHILD FIND AND IDENTIFICATION FOR CHARTER SCHOOLS

A. Locate, identify, evaluate and provide FAPE for children from age 5 through 21 who are enrolled in the Charter School.

B. Conduct a screening within **45** calendar days of entry for each kindergarten and new student enrolled without appropriate records of screening, evaluation and progress in school. Child must be screened in six areas: academic, vision, hearing, communication, emotional and psychomotor.

C. If the screening indicates a possible disability, refer the child for evaluation or other appropriate services.

D. Identify local resources for referring parents of children birth to five years of age for screening and evaluation and if necessary, provision of appropriate services are identified.

Note: Document interventions attempted prior to referring for an evaluation.

STEP 2. INITIAL EVALUATION AND ELIGIBILITY DETERMINATION

Sections 300.320; 300.531-535

A. Provide Prior Written Notice and Procedural Safeguards Notice to parent.

B. Obtain parent consent.

C. Conduct full individual evaluation of the child's education needs.

D. Determine the child's category of eligibility and need for special education. A team of qualified individuals and the parent must complete this process. Provide the parent a copy of the evaluation report and documentation of eligibility. The parent must be involved in the eligibility determination.

STEP 3. IEP DEVELOPMENT - Sections 300.340-300.551

A. Provide a meeting notice and a Procedural Safeguard Notice to the parent.
B. Conduct meeting to develop the IEP(address all required components).
C. Determine Least Restrictive Environment (LRE) for implementation of the IEP.

STEP 4. INITIAL PLACEMENT- Sections 300.500 and 300.352

A. Determine educational placement of student.
B. Provide Prior Written Notice to parent.
C. Obtain informed parental consent.

STEP 5. IEP IMPLEMENTATION - Sections 300.342-343 and 300.350-552

A. Implement IEP in the LRE.
B. Provide copies of appropriate goals and objectives and other sections of IEP to all teachers involved in the implementation of the IEP.
C. Inform parents of progress

STEP 6. REVIEW AND REVISION OF IEP - Sections 300.346 and 300-533-536

A. Provide Meeting Notice/Procedural Safeguards Notice to the parent.
B. Review/revise components of IEP.
C. Determine LRE for implementation of the IEP.
D. Provide Prior Written Notice to parents.

STEP 7. RE-EVALUATION AND DETERMINATION OF ELIGIBILITY - Sections 300.346-300-533-536

Provide Meeting Notice and Procedural Safeguards Notice
REVIEW OF EXISTING DATA BY IEP TEAM

- No Additional Data Needed

1. MET Report and determine continued eligibility
2. Provide Prior Written Notice
3. Repeat STEPS 6 and 5

- Additional Data Needed

4. Provide Prior Written Notice to parent
5. Obtain parent consent
6. Conduct evaluation
7. Determination of eligibility/MET Report
8. Repeat STEPS 6 and 5

STEP 8. PROGRAM TERMINATION - Sections 300.122 and 530-536

REPEAT STEP 7

Section C

SPECIAL EDUCATION LAW

Individuals with Disabilities Education Act - 1997 Reauthorization

Arizona Hearing Officer Training

March 9-10, 1998

Presenter: Art Cernosia, Esq.
Burlington, Vermont

I. Introduction

A. The 1997 IDEA Reauthorization was signed into law on June 4, 1997. Unless otherwise noted in the outline, the new statutory provisions went into effect on June 4th, 1997.

This outline highlights the new statutory changes. Until the federal regulations are promulgated, many questions of statutory interpretation remain. The U.S. Office of Special Education Programs (OSEP) has issued draft regulations for public comment. Final regulations are anticipated to be published in the Spring of 1998.

B. There are four main themes in the IDEA Reauthorization as reflected in the General Provision part (Part A) of the IDEA. They are:

1. Strengthening Parental Participation in the Educational Process.
2. Accountability for Students' Participation and Success in the General Education Curriculum and Mastery of IEP Goals/Objectives.
3. Remediation and Disciplinary Actions addressing Behavior Problems at School and in the Classroom.
4. Responsiveness to the growing needs of an increasingly more diverse society.

© 1998 Art Cernosia, Esq.
Reprinted with Permission

II. Identification and Evaluation

A. Child Find (Section 1412(a)(3))

1. Covers all children with disabilities, including students attending private schools.

   The IDEA states:

   The State must demonstrate that all children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and that a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

2. No legal requirement that children be classified by their disability.

   The IDEA states:

   Nothing in this Act requires that children be classified by their disability so long as each child who has a disability listed in Sec. 602 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this part.

B. Initial Evaluation (Section 1414(a)(1)(A) and (B))

1. An initial evaluation shall be conducted before the initial provision of special education and related services to a child with a disability.

   The IDEA states:

   Such initial evaluation shall consist of procedures (1) to determine whether a child is a child with a disability; and (2) to determine the educational needs of such child.

C. Notice/Consent for initial evaluation (Section 1414(b) and (a)(1)(C))

2. Written notice of initial evaluation

The IDEA states:

The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4) and (c) of Section 615, that describes any evaluation procedures such agency proposes to conduct.

3. Consent for initial evaluation

The IDEA states:

The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in Sec. 602 (3)(A) or 602 (3)(B) shall obtain an informed consent from the parent of such child before the evaluation is conducted. Parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services.

4. Refusal to consent. The District may use mediation and due process hearing procedures to pursue the evaluation.

The IDEA states:

If parents refuse consent for initial evaluation, the district may use mediation and due process procedures to pursue the evaluation, except if inconsistent with state law.

D. Re-evaluations (Section 1414 (a)(2) and (c)(3))

1. A re-evaluation is required to be conducted if conditions warrant, if the child's parent or teacher requests but at least once every 3 years.

2. Consent required. A District may conduct the re-evaluation without consent if it has taken reasonable measures to obtain consent and the parent has not responded.

The IDEA states:

Each LEA shall obtain informed parental consent prior to conducting any

BEST COPY AVAILABLE

reevaluation of a child with a disability, except that such informed consent need not be obtained if the LEA can demonstrate that it has taken reasonable measures to obtain such consent and the child's parent has failed to respond.

E. Evaluation Contents (Section 1414(b)(2) and (3))

1. Relevant functional and developmental information
2. Information from parents
3. Information related to enabling access in and progress in the general curriculum
4. Technically sound instruments that assess cognitive and behavioral factors
5. Review of existing data
6. Current classroom-based assessments and observations
7. Teacher and related service providers' observations

NOTE: The proposed federal regulations define general curriculum as "the curriculum adopted by an LEA, schools within the LEA, or where applicable, the SEA for all children from preschool through secondary school. (300.12)

The IDEA states:

In conducting the evaluation, the LEA shall:

> *use a variety of assessment tools and strategies to gather relevant functional and developmental information, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general curriculum or, for preschool children, to participate in appropriate activities;*
>
> *not use any single procedure as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and*
>
> *use technically sound instruments that may assess the relevant contribution of cognitive and behavioral factors, in addition to physical or developmental factors.*
>
> *As part of any initial evaluation (if appropriate) and as part of any reevaluation, the IEP team and other qualified professionals, as*

appropriate, shall --

> *review existing evaluation data on the child, including evaluations and information provided by the parents of the child, current classroom-based assessments and observations, and teacher and related services providers observation; and*
>
> *on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine --*
>
>> *whether the child has a particular category of disability, or, in the case of a reevaluation of a child, whether the child continues to have such a disability;*
>>
>> *the present levels of performance and educational needs of the child;*
>>
>> *whether the child needs special education and related services, or in the case of a re-evaluation of a child, whether the child continues to need special education and related services; and,*
>>
>> *whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general curriculum.*

F. Scope of Re-evaluation (Section 1414 (c)(4))

1. If the IEP Team and "other qualified professionals" determines that no additional data is needed to confirm continued eligibility, the District shall:

    a. Provide notice to parents
    b. Right of parents to request additional assessments.

    The IDEA states:

    If the IEP team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, the LEA --

shall notify the child's parents of:

that determination and the reasons for it; and

the right of such parents to request an assessment to determine whether the child continues to be a child with a disability; and

shall not be required to conduct such an assessment unless requested to by the child's parents

2. An LEA shall evaluate a child with a disability before determining that the child is no longer a child with a disability.

III. Eligibility (Section 1414(b)(4) and (5))

A. The term 'child with a disability' means a child--
   1. with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
   2. who, by reason thereof, needs special education and related services. (Section 1402 (3))

B. Decision made by a team of qualified individuals and the parent

C. Copy of the eligibility determination and evaluation report provided to parent

D. Not eligible if the determinant factor is the lack of instruction in reading or math or limited English proficiency

E. States have the discretion of using the "developmental delay" standard for determining eligibility for students ages 3 through 9.

F. Free Appropriate Public Education

The term 'free appropriate public education' means special education and related services that--
   1. have been provided at public expense, under public supervision and

direction, and without charge;
2. meet the standards of the State educational agency;
3. include an appropriate preschool, elementary, or secondary school education in the State involved; and
4. are provided in conformity with the individualized education program.

(Section 1402(8))

The IDEA states:

> *The determination of whether the child is a "child with a disability" shall be made by a team of qualified professionals and the parent of the child; and*
>
> *a copy of the evaluation report and the documentation of eligibility will be given to the parent.*
>
> *In making a determination of eligibility, a child shall not be determined to be a child with a disability if the determinant factor for such determination is lack of instruction in reading or math or limited English proficiency.*

IV. Individual Education Programs (IEP) (effective, July 1998)

A. IEP Team (Section 1414(d)(1)(B))

1. the parents;

2. at least one regular education teacher of such child (if the child is, or may be, participating in regular education);

The IDEA states:

> *The regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive*
>
> *behavioral interventions and strategies and the determination of supplemental aids and services, program modifications, and support for school personnel.*
>
> NOTE: The proposed federal regulations contains a note that if the child has more than one teacher, the LEA may designate which teacher or

teachers participate.

Also, as applied to preschool children aged 3-5, if the LEA does not provide regular education services to nondisabled children, the agency would designate an individual who, under state standards, is qualified to serve nondisabled children of the same age.

3. at least one special education teacher, or where appropriate, at least one special education provider of such child;

4. a representative of the LEA who --

    i. is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

    ii. is knowledgeable about the general curriculum; and

    iii. is knowledgeable about the availability of resources of the LEA.

    NOTE: The proposed federal regulations note that such LEA representative must have the authority to commit agency resources and be able to ensure that whatever services are set out in the IEP will actually be provided. (App. C, Question 22)

5. an individual who can interpret the instructional implications of evaluation results - who may be one of the above members;

6. at the discretion of the parent or the LEA, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

7. whenever appropriate, the child with a disability.

8. If transition services are being discussed, representatives of other agencies who are likely to be responsible for paying for or providing transition services must be invited.

NOTE: The proposed Appendix C to the federal regulations states that if consensus cannot be reached regarding IEP decisions, the public agency has the ultimate responsibility to ensure FAPE and make the decision. In such case, the agency. must provide the parents prior written notice. Every effort should be made to resolve differences through mediation or other informal steps. (Question #9, Appendix C)

B. Team Considerations (Section 1414(d)(3)(A) and (B))
   1. Strengths of the child
   2. Concerns of the parent
   3. Evaluation results
   4. If behavior impedes learning of self or others, strategies, interventions and supports
   5. Language needs of a child with limited English proficiency
   6. Instruction in Braille for students who are blind or visually impaired
   7. Language and communication needs of students who are deaf or hard of hearing
   8. Assistive Technology Device/Service needs

The IDEA states:

> (1) *In developing each child's IEP, the IEP team shall consider --*
>
> *(a) the strengths of the child and the concerns of the parents for enhancing the education of their child; and*
>
> *(b) the results of the initial evaluation or most recent evaluation of the child.*
>
> *(2) The IEP team shall --*
>
> *(a) In the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;*
>
> *(b) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relates to the child's IEP;*
>
> (c) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille

unless the IEP team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child.

(d) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(e) consider whether the child requires assistive technology devices and services.

C. IEP Contents (Section 1414(d)(1)(A))

1. Present Level of Performance
    a. involvement and progress in the general curriculum

2. Goals/Benchmarks/Objectives
    a. Involvement and progress in the general curriculum

NOTE: The proposed Appendix C to the federal regulations define short-term objectives as measurable, intermediate steps and benchmarks as major milestones. (Question #1)

Also, the annual goals must only address those general curriculum areas in which the child's involvement and progress are affected by the child's disability . (Question #4)

3. Special Education and Related Services
    a. anticipated frequency, location and duration
    b. projected date for the beginning of services

4. Supplementary Aids and Services

Supplementary Aids and Services is now defined as aids, services and

BEST COPY AVAILABLE

other supports that are provided in regular education classes or other educationally related settings to enable students with disabilities to be educated with nondisabled students to the maximum extent appropriate.

5. Program Modifications

6. Support for school personnel to assist the student in meeting IEP goals, progress in the general curriculum, and to be educated with nondisabled children

7. Explanation of the extent, if any, to which the child will not participate in class and activities with nondisabled children

8. Participation/Modifications, if any, in District and State assessments

9. Transition

   a. no later than 14 years of age, and annually up-dated, transition services addressing courses of study

   b. no later then 16 years of age, other transition services including interagency responsibilities

   c. at least one year before reaching the age of majority, a statement of rights under State law

   d. alternative strategies to meet transition objectives if other agencies fail to provide IEP services.

10. How progress will be measured and how parents will be informed of their child's progress, at least as often as parents of children who are not disabled.

The IDEA states:

> *The IEP includes.....*
>
> (1) *a statement of the child's present levels of educational performance, including --*
>
> *i)* *how the child's disability affects the child's involvement and progress in the general curriculum; or*

ii) *for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;*

(2) *a statement of measurable annual goals, including benchmarks or short-term objectives, related to --*

i) *meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and*

ii) *meeting each of the child's other educational needs that result from the child's disability.*

(3) *a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and any program modifications or supports for school personnel that will be provided for the child --*

i) *to advance appropriately toward attaining the annual goals;*

ii) *to be involved and progress in the general curriculum and to participate in extracurricular and other nonacademic activities; and*

iii) *to be educated and participate with other children with disabilities and nondisabled children in the activities described in this paragraph.*

(4) *an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in special education classes;*

(5) *a statement of any individual modifications in the administration of State or district wide assessments of student achievement that are needed in order for the child to participate in such assessment; and, if the IEP team determines that the child will not participate in a particular State or district wide assessment of student achievement (or part of such an assessment), a statement of --*

i) why that assessment is not appropriate for the child; and

ii) how the child will be assessed.

(6) the projected date for the beginning of the services and modifications needed for the child, and the anticipated frequency, location, and duration of those services and modifications.

(7) a) beginning at age 14, and updated annually, a statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's courses of study (such as participation in advanced-placement courses or a vocational educational program);

b) beginning at age 16 (or younger, if determined appropriate by the IEP team), a statement of needed transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages; and

c) beginning at least one year before the child reaches the age of majority under State law, a statement that the child has been informed of his or her rights under this title, if any, that will transfer to the child on reaching the age of majority; and

(8) a statement of:

(a) how the child's progress toward the annual goals will be measured; and

(b) how the child's parents will be regularly informed (by such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of --

i) their child's progress toward the annual goals; and

ii) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

3

Failure to Meet Transition Objectives

> *If a participating agency, other than the LEA, fails to provide the transition services described in the IEP, the LEA shall reconvene the IEP team to identify alternative strategies to meet the transition objectives for the child set out in that program..*

V. Placement Issues

A. Least Restrictive Environment (Section 1412(a)(5))

1. To the maximum extent appropriate, children with disabilities are educated with children who are not disabled. Each public agency shall ensure that a continuum of alternative placements is available.
2. Parents must be made members of placement teams.
3. State funding formulas based on the type of setting in which the child is served must be reviewed to ensure that it does not support the violation of LRE requirements. If so, state must revise the funding mechanism as soon as feasible.

B. Unilateral Placements (Section 1412(a)(10)(C))

1. Applies to students who previously received special education services from a public agency.
2. A Hearing Officer or Court may order reimbursement if a FAPE was not made available in a timely manner before the student was removed from public school.
3. Parental Notice of Unilateral Private Placement - Reimbursement for the costs of a unilateral private school placement may be reduced or denied if:
    a. at the most recent IEP meeting that the parents attended prior to removal of their child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the LEA, including stating their concerns and their intent to enroll their child in a private school at public expense; or

b. 10 business days prior to the removal of the child from public school, the parents did not give written notice to the LEA of their intent to make a unilateral private school placement and a statement of their concerns; or

c. prior to the parent's removal of the child from the public school, the LEA informed the parents in writing, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

d. upon a judicial finding of unreasonableness with respect to actions taken by the parents.

e. EXCEPT —

    i) if the parent is illiterate and cannot write in English;

    ii) compliance with the notice requirement would likely result in physical or serious emotional harm to the child;

    iii) the school prevented the parent from providing such notice; or

    iv) the parents had not received notice from the LEA of their obligation to provide notice of their intent to make a unilateral private school placement.

C. Private School Students (Section 1412(a)(10)(A))

1. To the extent consistent with their number and location in the State, amounts expended by a school district in providing services must be equal to a proportional amount of Federal special education funds.

2. Special education services may be provided on site, including parochial schools, to the extent consistent with law.

VI. Disciplinary Actions

A. Short term suspensions, appropriate interim alternative settings or other settings may be ordered for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities) Section 1415(k)(1)(A)(I))

The IDEA states:

> *School personnel may order a change in placement of a child with a disability -*
>
> > *to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities)*
> >
> > NOTE: U.S. Department of Education advisory guidance and the proposed regulations state that for removal from the child's current placement for 10 school days or less during a school year:
> >
> > (1) No need to conduct a manifestation determination.
> > (2) No requirement to provide services during this period.
> > (3) No need to conduct a functional behavioral assessment.

B. Interim Alternative Educational Setting (IAES) (up to 45 days) (Section 1415(k)(1)(A)(ii))

1. Weapons in school or at school functions
2. Possession or use of illegal drugs
3. Sale or solicitation of a controlled substance
4. IEP Team decision
5. IAES must enable the student to continue to participate in the general curriculum, although in another setting
6. IAES must provide services and modifications described in current IEP which will enable the student to meet IEP goals
7. IAES must provide services and modifications to address the behavior "so that it does not recur."

The IDEA states:

School personnel may order a change in placement of a child with a disability --

a. *to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days if --*

    i) *the child carries a weapon to school or to a school function under the jurisdiction of a State or LEA; or*

    ii) *the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or LEA.*

b. *The alternative educational setting shall be determined by the IEP Team and must be selected so as to:*

> *enable the student to continue to participate in the general curriculum, although in another setting; to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the student to meet the IEP goals set out in the IEP; and include services and modifications designed to address the misbehavior so that it does not recur.*

C. Safety/Dangerousness (Section 1415(k)(2))

1. A school district may seek a hearing officer order placing a student in an IAES for up to 45 days if:

    a. the district has demonstrated by substantial evidence that maintaining the current placement is substantially likely to result in injury to the student or others;

    b. the current placement is appropriate; and

    c. the district has made reasonable efforts to minimize the risk of harm in the current placement.

The IDEA states:

> *A hearing officer may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer --*
>
> *(a) determines that the LEA has demonstrated by substantial evidence (defined as "beyond a preponderance of the evidence") that maintaining the current educational placement of such child is substantially likely to result in injury to the child or to others;*
>
> *(b) considers the appropriateness of the child's current placement;*
>
> *(c) considers whether the LEA has made reasonable efforts to minimize the risk of harm in the child's current educational placement, including the use of supplementary aids and services; and;*
>
> *(d) determines that the interim alternative educational setting enables the child to continue to participate in the general curriculum although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP, and includes services and modifications designed to address the behavior so that it does not recur.*

D. Behavior Assessments/Behavior Intervention Plans (Section 1415(1)(B))

1. Not later than 10 days after taking disciplinary action involving placement in an IAES, the school district shall:

   a. convene an IEP meeting to:

      (1) develop a functional behavioral assessment plan to address the behavior if one had not been conducted; or

(2) if student already has a behavior plan, to review the plan and modify it as necessary.

NOTE: The proposed federal regulations define the 10 days as 10 business days. (300.520)

The IDEA states:

Either before or not later than 10 days after taking a disciplinary action [described in VI (B) of this outline] --

(a) if the LEA did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted in the suspension, the LEA shall convene an IEP meeting to develop an assessment plan to address that behavior; or

(b) if the child already has a behavioral intervention plan, the IEP team shall review the plan and modify it, as necessary, to address the behavior.

E. Manifestation Determination (Section 1415(k)(4))

1. Required if the school is considering removing the child with a disability from their educational placement for more than 10 school days in a given school year or placement in an Interim Alternative Education Setting.

2. Procedures

   a. IEP Team and "other qualified personnel"
   b. Determination made within 10 school days after the date on which the decision to take that action is made
   c. Parent notification of disciplinary action and all procedural safeguards accorded

3. Considerations (Section 1415(k)(4)(C))

   a. evaluation and diagnostic results
   b. relevant information supplied by the parents
   c. observations of the student
   d. IEP and placement

4. Standards

   a. IEP Team may determine that the behavior was not a manifestation of the disability only if:

      (1) in relation to behavior, the IEP and placement are deemed appropriate;

      (2) the IEP services and behavior intervention strategies were implemented;

      (3) the disability did not impair the ability of the child to understand the impact and consequences of the behavior; and

      (4) the disability did not impair the student's ability to control the behavior.

The IDEA states:

> *If a disciplinary action is contemplated,* [as described in VI (B) or (D) of this outline], *for a child with a disability or if a disciplinary action involving a change of placement for more than 10 days is contemplated for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the LEA that applies to all children -*
>
> > *not later than the date on which the decision to take that action is made, the parents shall be notified of that decision and of all procedural safeguards accorded under the law; and*
> >
> > *immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review shall be conducted of the relationship between the child's disability and the behavior subject to the disciplinary review. A review shall be conducted by the child's IEP team and other qualified personnel.*
>
> *The IEP team may determine that the behavior of the child was not a manifestation of the child's disability only if the IEP team --*

first considers, in terms of the behavior subject to disciplinary action, all relevant information, including --

evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;

observations of the child; and

the child's IEP and placement; and

then determines that --

in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

F. No Manifestation (Section 1415 (k)(5))

1. Regular Disciplinary Hearing

    a. Special education and Disciplinary records sent to disciplinary hearing authority

2. Continue to provide a free appropriate public education

NOTE: The proposed federal regulations state that the right to a FAPE begins on the 11th school day in a school year that they are removed from their current educational placement.

In providing a FAPE, a public agency shall through the IEP Team, provide continued participation in the general education curriculum, although in another setting; continued IEP services; and services and modifications designed to address the behavior so that it does not recur. (300.121)

The IDEA states:

> *If the IEP team determines that the behavior was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except the child with a disability must continue to receive a free appropriate public education (FAPE).*
>
> *If the public agency initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.*

G. Expedited Due Process Hearings (Section 1415(k)(6) and (7))

1. Parent may challenge manifestation determination or any decision regarding placement with a right to have an expedited due process hearing.

   NOTE: The proposed regulations define an expedited hearing as one which results in a decision within 10 business days of the request unless the parents and school otherwise agree. (300.528)

The IDEA states:

> *If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing . The State or LEA shall arrange for an expedited hearing in any case described in this section when requested by a parent.*
>
> *In reviewing decision with respect to the manifestation determination, the hearing officer shall determine whether the LEA has demonstrated that the child's behavior was not a manifestation of the child's disability*

BEST COPY AVAILABLE

consistent with the requirements of (4)(c) [as described in VI(E) of this outline].

In reviewing a decision to place the child in an IAES, the hearing officer shall apply the standards set out in paragraph 2 [as described in VI (D) of this outline].

2. "Stay Put" is the IAES pending the decision or the expiration of IAES, which ever occurs first, unless otherwise agreed upon

3. If proposed change is to occur after IAES, "stay put" is the child's placement prior to the IAES

4. "Stay Put" Exception for dangerousness
   a. Expedited hearing

The IDEA states:

> *When a parent requests a hearing to challenge a disciplinary action, placement in an interim alternative educational setting, or a manifestation determination, the child shall remain in the interim alternative educational setting during the pendency of the hearing or until the expiration of the 45 day period, whichever occurs first, unless the parent and the LEA agree otherwise.*
>
> *If a child is placed in an interim alternative educational setting and the LEA proposes to change the child's placement after expiration of the IAES, during the pendency of a hearing to challenge the proposed change in placement, the child shall remain in the current placement (the placement prior to the interim alternative educational setting), except ---*
>
> *If the LEA maintains that it is dangerous for the child to be in the current placement during the pendency of the hearing, the LEA may request an expedited hearing. In such hearing, the hearing officer must apply the standards which apply to the dangerousness exception.*

H. Students Not Yet Eligible (Section 1415(k)(8))

1. May assert IDEA protections if it is shown school district had knowledge that the child had a disability before the behavior incident

2. The district shall be deemed to have such knowledge if:

   a. parent has expressed concern in writing to school personnel that the child is in need of special education;

   b. parent has requested an evaluation;

   c. the behavior or performance of the child demonstrates need for special education; or

   d. the teacher or other school personnel expressed concern about the child's behavior or performance to the special education director or to other school personnel.

The IDEA states:

> *A child who has not been determined to be eligible for special education and related services and who has engaged in behavior that violated any rule or code of conduct of the LEA may assert any of the disciplinary protections if the LEA had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.*
>
> *A LEA shall be deemed to have knowledge that a child was a child with a disability if:*
>
> > *the parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with this requirement) to personnel of the appropriate educational agency that the child is in need of special education and related services;*
> >
> > *the behavior or performance of the child demonstrates the need for such services;*
> >
> > *the parent of the child has requested an evaluation of the child; or,*
> >
> > *the teacher of the child, or other personnel of the LEA, has expressed concern about the behavior or performance of the child to the director of special education or other personnel of the agency.*

3. If the LEA does not "have knowledge" that a child is a child with a disability prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as are applied to children without disabilities who engage in comparable behaviors.

4. If a parent requests an evaluation of a regular education child who is suspended or expelled, the evaluation must be expedited. Pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

I. Referral to Law Enforcement/Judicial Authorities (Section 1415(k)(9))

1. IDEA does not limit a district from reporting a crime to appropriate agencies

2. Transfer of special education and disciplinary records

The IDEA states:

> *Nothing in this part shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability;*
>
> *An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.*

J. Discipline Records (Section 1413(j))

1. A state may require that LEAs include information regarding current or previous disciplinary actions to be included in the education records of a student with a disability to the same extent as students who are not disabled.

2. Content of the record includes a description of:
   a. behavior requiring disciplinary action

   b. disciplinary action taken
   c. other relevant information regarding the safety of the child or others

3. Transmission of records include:
   a. statement of disciplinary action, and
   b. IEP

VII. Procedural Safeguards (Section 1415)

A. State/Local procedures must be established (Section 1415(a))

The IDEA states:

> *Any State educational agency, State agency, or LEA that receives assistance under this part shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.*

B. Written Notice (Section 1415(b)(3), (4) and (c))

1. Parents must receive prior written notice whenever the agency proposes to or refuses to change:
   a. identification
   b. evaluation
   c. educational placement; or
   d. provision of a free appropriate public education

2. The notice must:
   a. be in parents' native language, unless it is clearly not feasible to do so
   b. describe the action
   c. explain why the agency is proposing/refusing such action
   d. description of other options considered
   e. evaluations and other information used as a basis for the action
   f. other relevant factors
   g. how a copy of the procedural safeguards can be obtained
   h. resources to assist parents

   NOTE: The proposed regulations add a requirement that the notice must inform parents about the State complaint procedures. (300.503)

C. Notice of Procedural Safeguards shall be provided at a minimum: (Section 1415(d)(1))

1. Initial referral for evaluation
2. Re-evaluation
3. Notice of each IEP meeting
4. Filing a due process hearing complaint

D. Content of Procedural Safeguards must include a full explanation of: (Section 1415(d)(2))

1. independent educational evaluation
2. prior written notice
3. parental consent
4. access to educational records
5. opportunity to present complaints
6. "stay put" - placement during pendency of due process
7. procedures for placement in an interim alternative educational setting
8. requirements for unilateral placements by parents seeking public payment
9. mediation
10. due process hearings - including disclosure of evaluation results
11. state level appeals (if applicable)
12. civil actions
13. attorneys' fees

E. Mediation (Section 1415(e))

1. Available, at a minimum, to parties who request a hearing
2. Voluntary
3. Not used to delay/deny rights
4. Conducted by a qualified and impartial mediator
    a. trained in effective mediation techniques
    b. knowledgeable in special education law
    c. list maintained by State
5. State shall cover cost of mediation
6. Written Mediation Agreement

7. Confidentiality Pledge

8. May require parents who chose not to use mediation to meet with a disinterested party to encourage use of mediation

F. Due Process Hearings (Section 1415(f))

1. Notice by Parent/Attorney (Section 1415(b)(7))
   a. name and address of child
   b. school of attendance
   c. description of the nature of the problem including facts
   d. proposed resolution
   e. model form developed by State

2. Disclosure of Evaluation Information (Section 1415(f)(2))
   a. evaluations and recommendations to be introduced at hearings
   b. disclosed at least five business days prior to hearing

3. Hearing Procedures (Section 1415(h))
   a. right to representation by attorneys/advocates
   b. right to present evidence, cross-examine and compel attendance of witnesses
   c. parent has option of written or electronic verbatim records
   d. parent has option of a written or electronic decision

G. Attorney's Fees (Section 1415(I)(3))

1. Court has discretionary authority to award reasonable fees to parents who prevail

2. No fees for IEP meetings unless ordered by Hearing Officer or Court

3. State may prohibit fees for mediations conducted prior to hearing request

4. Court may reduce fees if:
   a. parent unreasonably protracted final resolution;
   b. fees are unreasonable;
   c. hearing request did not provide appropriate information.

5. Fees may be denied if parents rejected an offer of written settlement, made at least 10 days before the hearing, which was as favorable as the decision

H. Surrogate Parent (Section 1415(b)(2))

1. A surrogate parent shall be appointed whenever:
   a. parents are not known;
   b. parents cannot be located after reasonable efforts; or
   c. child is a ward of the state

VIII. Funding

A. Child Count will be used as the basis for distribution of federal special education funds up to the $4.9 billion appropriation level.. (Section 1411 (d)(1))

B. For appropriations exceeding $4.9 billion, 85% of the excess amount will be distributed based on general child population data and 15% will be distributed based on a poverty factor. (Section 1411(e)(3))

C. 25% state set aside is maintained by the State Education Agency at FY '97 levels with adjustments in future years at the lesser of - percentage increase of federal appropriations or rate of inflation. (Section 1411(f))

1. The difference between the rate of inflation and increase in federal appropriations shall be distributed to local school districts through sub-grants for assistance in providing direct services and making systemic changes.

D. A state may not reduce the amount of state financial support for special education and related services below the amount of such support for the preceding fiscal year.

A one year waiver from this state maintenance of effort requirement may be granted for "exceptional or uncontrollable circumstances," or clear and convincing evidence that all children have FAPE available. (Sec 1412(a)(19))

E. Local Maintenance of Effort requirements modified to allow reduction of expenditures attributable to:

1. voluntary departure or departure for just cause of special education personnel

2. decrease in enrollment of students with disabilities
3. termination of obligation to provide exceptionally costly program to a student
4. termination of costly expenditures for long-term projects (Section 1413 (a)(2)(B))

F. Incidental Benefit

1. Part B funds could be used for services in a regular class to a child with a disability even if children who are not disabled benefit. (Section 1413 (a)(4)(A))

IX. Miscellaneous

A. Definitions

1. Serious Emotional Disturbance becomes Emotional Disturbance.

2. Related Services is amended by adding orientation and mobility training.

B. OSEP Policy Letters (Section 1406(c))

1. The Secretary of Education cannot use policy letters to establish a rule required for compliance or state eligibility without going through the formal rule making process.

C. Charter Schools (Section 1413(a)(5))

1. A school district shall provide funding and serve children with disabilities in Charter schools of the district in the same manner it serves those in other schools.

D. Corrections (Sections 1414(d)(6) and 1412(a)(1)(B)(*ii*))

1. The Governor or designee may assign responsibility for compliance to any public agency for provision of special education in adult prisons.

2. FAPE must be made available unless an inmate, aged 18 through 21, in an adult correctional facility was not identified as having a disability prior to

incarceration.

3. The following requirements do not apply to students with disabilities who are convicted as adults under State law and placed in adult prisons:

    a. participation in general assessments
    b. transition if they will turn 22 years of age before being released
    c. LRE if the state has demonstrated a bona fide security or compelling penalogical interest that cannot be accommodated

E. Suspension/Expulsion Rates (Section 1412 (a)(22))

1. SEA must collect and analyze data from LEAs

2. Determine if significant discrepancies exist between LEAs or in rates of disabled and non-disabled students within same LEA

3. If discrepancy exists, examine policies, procedures and practices

F. Interagency Agreements (Section 1412(a)(12))

1. Governor shall ensure interagency agreements/mechanisms are in effect between the SEA and appropriate agencies

2. Content
    a. Defined financial responsibility
    b. Defined service responsibility
    c. Process for payment by LEA/SEA if dispute/failure to pay/provide

G. Comprehensive System of Professional Development (effective July 1998) (Section 1412(a)(14))

1. Plan to ensure adequate supply of qualified personnel
2. Meets requirements of State Improvement Plan

H. State Assessments (Section 1412(a)(17)

1. Guidelines for participation of students with disabilities
2. Development and implementation of alternative assessments by July, 2000
3. Reports to the public on participation

BEST COPY AVAILABLE

I. State Performance Goals and Indicators (effective July 1998) (Section 1412 (a)(16))

1. Goals to promote purposes of the IDEA and other State Goals and Standards

2. Performance indicators to assess, at a minimum:
   a. assessment performance
   b. drop-out rates
   c. graduation rates

3. Public Reports every two years

J. Data Requirements (effective July 1, 1998)
1. States must provide on an annual basis the following data to the U.S. Department of Education

   a. The number of students with disabilities by:
      (1) race
      (2) ethnicity
      (3) disability category

   who are:
      (a) receiving a FAPE
      (b) participating in regular education
      (c) placed in separate programs and residential settings
      (d) exited from special education including the reasons (for students ages 14 - 21)
      (e) removed to an Interim Alternative Education Setting
         i) acts precipitating removals
         ii) number of students subject to long-term suspension/expulsion

   b. Number of Infants and Toddlers by race and ethnicity who are "at risk" and receiving Early Intervention (Part C) services

   c. Sampling may be permitted

   d. Each state shall collect and analyze data to determine if as "significant disproportionality" exists based on race with respect to

(a) identification by impairment, and
(b) placement

If so, a review shall be conducted to determine if revisions are required in policies, procedures and practices.

X. Questions/Comments

13 pages of Appendices follow:

U.S. Code Annotated - Title 18 - Firearms (1 page)

U.S. Code Annotated - Title 21 - Food and Drugs
Chapter 13 -- Drug Abuse Prevention and Control
Subchapter 1 -- Control and Enforcement
Part B - Authority to control; standards and schedules (6 pages)

U.S. Department of Education, OSEP 97-7 Memorandum
to: Chief State School Officers
dated September 19, 1997 (5 pages)

Suspension/Expulsion Steps (1 page)

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 44--FIREARMS

Current through P.L. 104-333, approved 11-12-96

§ 930. Possession of firearms and dangerous weapons in Federal facilities

* * * * *

(g) As used in this section:

* * *

(2) The term "dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length.

* * * *

UNITED STATES CODE ANNOTATED
TITLE 21. FOOD AND DRUGS
CHAPTER 13--DRUG ABUSE PREVENTION AND CONTROL
SUBCHAPTER I--CONTROL AND ENFORCEMENT
PART B--AUTHORITY TO CONTROL; STANDARDS AND SCHEDULES

Current through P.L. 104-333, approved 11-12-96

§ 812. Schedules of controlled substances

* * * * *

(c) Initial schedules of controlled substances

Schedules I, II, III, IV, and V shall, unless and until amended > [FN1] pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

Schedule I

(a) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Acetylmethadol.
(2) Allylprodine.
(3) Alphacetylmathadol.
(4) Alphameprodine.
(5) Alphamethadol.
(6) Benzethidine.
(7) Betacetylmethadol.
(8) Betameprodine.
(9) Betamethadol.
(10) Betaprodine.
(11) Clonitazene.
(12) Dextromoramide.
(13) Dextrorphan.
(14) Diampromide.
(15) Diethylthiambutene.
(16) Dimenoxadol.
(17) Dimepheptanol.
(18) Dimethylthiambutene.
(19) Dioxaphetyl butyrate

[FN1] Revised schedules are published in the Code of Federal Regulations, Part 1308 of Title 21, Food and Drug.

BEST COPY AVAILABLE

(20) Dipipanone.
(21) Ethylmethylthiambutene.
(22) Etonitazene.
(23) Etoxeridine.
(24) Furethidine.
(25) Hydroxypethidine.
(26) Ketobemidone.
(27) Levomoramide.
(28) Levophenacylmorphan.
(29) Morpheridine.
(30) Noracymethadol.
(31) Norlevorphanol.
(32) Normethadone.
(33) Norpipanone.
(34) Phenadoxone.
(35) Phenampromide.
(36) Phenomorphan.
(37) Phenoperidine.
(38) Piritramide.
(39) Proheptazine.
(40) Properidine.
(41) Racemoramide.
(42) Trimeperidine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine.
(2) Acetyldihydrocodeine.
(3) Benzylmorphine.
(4) Codeine methylbromide.
(5) Codeine-N-Oxide.
(6) Cyprenorphine.
(7) Desomorphine.
(8) Dihydromorphine.
(9) Etorphine.
(10) Heroin.
(11) Hydromorphinol.
(12) Methyldesorphine.
(13) Methylhydromorphine.
(14) Morphine methylbromide.
(15) Morphine methylsulfonate.
(16) Morphine-N-Oxide.
(17) Myrophine.
(18) Nicocodeine.
(19) Nicomorphine.

BEST COPY AVAILABLE

(20) Normorphine.
(21) Pholcodine.
(22) Thebacon.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) 3,4-methylenedioxy amphetamine.
(2) 5-methoxy-3,4-methylenedioxy amphetamine.
(3) 3,4,5-trimethoxy amphetamine.
(4) Bufotenine.
(5) Diethyltryptamine.
(6) Dimethyltryptamine.
(7) 4-methyl-2,5-dimethoxyamphetamine.
(8) Ibogaine.
(9) Lysergic acid diethylamide.
(10) Marihuana.
(11) Mescaline.
(12) Peyote.
(13) N-ethyl-3-piperidyl benzilate.
(14) N-methyl-3-piperidyl benzilate.
(15) Psilocybin.
(16) Psilocyn.
(17) Tetrahydrocannabinols.

Schedule II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (1), except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific

BEST COPY AVAILABLE

chemical designation:

(1) Alphaprodine.
(2) Anileridine.
(3) Bezitramide.
(4) Dihydrocodeine.
(5) Diphenoxylate.
(6) Fentanyl.
(7) Isomethadone.
(8) Levomethorphan.
(9) Levorphanol.
(10) Metazocine.
(11) Methadone.
(12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane.
(13) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid.
(14) Pethidine.
(15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine.
(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate.
(17) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.
(18) Phenazocine.
(19) Piminodine.
(20) Racemethorphan.
(21) Racemorphan.

(c) Unless specifically excepted or unless listed in another schedule, any injectable liquid which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

Schedule III

(a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.
(2) Phenmetrazine and its salts.
(3) Any substance (except an injectable liquid) which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.
(4) Methylphenidate.

(b) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.
(2) Chorhexadol.
(3) Glutethimide.
(4) Lysergic acid.
(5) Lysergic acid amide.

BEST COPY AVAILABLE

(6) Methyprylon.
(7) Phencyclidine.
(8) Sulfondiethylmethane.
(9) Sulfonethylmethane..
(10) Sulfonmethane.

(c) Nalorphine.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.

(2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.

(4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(e) Anabolic steroids

Schedule IV

(1) Barbital.
(2) Chloral betaine.
(3) Chloral hydrate.
(4) Ethchlorvynol.
(5) Ethinamate.
(6) Methohexital.
(7) Meprobamate.
(8) Methylphenobarbital.
(9) Paraldehyde.
(10) Petrichloral.

(11) Phenobarbital.

Schedule V

Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams.

(2) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams.

(3) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams.

(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.

(5) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.

(d) Repealed. Pub.L. 98-473, Title II, § 509(b), Oct. 12, 1984, 98 Stat. 2072

BEST COPY AVAILABLE

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

SEP 19 1997

Contact Persons
Names : JoLeta Reynolds
Rhonda Weiss
Telephone: (202) 205-5507

OSEP 97-7

MEMORANDUM

TO : Chief State School Officers

FROM : Judith E. Heumann
Assistant Secretary
Office of Special Education and
Rehabilitative Services

Thomas Hehir
Director
Office of Special Education Programs

SUBJECT: Initial Disciplinary Guidance Related to Removal of Children with Disabilities from their Current Educational Placement for Ten School Days or Less

INTRODUCTION

The purpose of this memorandum is to provide initial guidance on the requirements of the Individuals with Disabilities Education Act Amendments of 1997 (IDEA '97) as they relate to the removal of children with disabilities from their current educational placement for ten school days or less. The Department has received numerous requests for guidance concerning the discipline provisions of IDEA '97. The Department plans to regulate in each of the areas where clarification is needed.

Four basic themes run throughout the statute concerning discipline:

(1) All children, including children with disabilities, deserve safe, well-disciplined schools and orderly learning environments;

(2) Teachers and school administrators should have the tools they need to assist them in preventing misconduct and discipline problems and to address these problems, if they arise;

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202

Our mission is to ensure equal access to education and to promote educational excellence throughout the Nation.

BEST COPY AVAILABLE

(3) There must be a balanced approach to the issue of discipline of children with disabilities that reflects the need for orderly and safe schools and the need to protect the right of children with disabilities to a free appropriate public education (FAPE); and

(4) Appropriately developed IEPs with well developed behavior intervention strategies decrease school discipline problems.

With regard to discipline for children with disabilities, IDEA '97:

- Brings together for the first time in the Statute the rules that apply to children with disabilities who are subject to disciplinary action and clarifies for school personnel, parents, students, and others how school disciplinary rules and the obligation to provide FAPE fit together by providing specificity about important issues such as whether educational services can cease for a disabled child; how manifestation determinations are made; what happens to a child with disabilities during parent appeals; and how to treat children not previously identified as disabled.

- Includes the regular education teacher of a child with a disability in the child's IEP meetings to help ensure that the child receives appropriate accommodations and supports within the regular education classroom, and gives the regular teacher an opportunity to better understand the child's needs and what will be necessary to meet those needs, thus decreasing the likelihood of disciplinary problems.

- Allows school personnel to move a student with disabilities to an interim alternative educational setting for up to 45 days, if that student has brought a weapon to school or a school function, or knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function.

- Gives school personnel the option of asking a hearing officer to move children with disabilities to an interim alternative educational setting for up to 45 days, if they are substantially likely to injure themselves or others in their current placement.

INITIAL GUIDANCE REGARDING REMOVAL OF CHILDREN WITH DISABILITIES FROM THEIR CURRENT PLACEMENT

We recognize that the statute is susceptible to a number of interpretations in some areas related to discipline, but the position enunciated below represents what we believe is the better reading of the statute. We are providing this information (in a question and answer format) to assist States and school districts in implementing IDEA '97 prior to publication of Department regulations. To the extent these questions and answers provide information not

BEST COPY AVAILABLE

specifically addressed in the Statute, the information is being provided as non-binding/non regulatory guidance. We will be issuing proposed regulations in the near future that reflect the positions taken in this document.

QUESTION 1: Under IDEA, do public agencies have a responsibility, as part of the IEP process, to consider a child's behavior?

ANSWER: Yes. Section 614(d)(2)(B) requires the IEP team "in the case of a child whose behavior impedes his or her learning or that of others, [to] consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior." In addition, school districts should take prompt steps to address misconduct when it first appears. Such steps could, in many instances, eliminate the need to take more drastic measures. These measures also could be facilitated through the individualized education program (IEP) and placement processes required by IDEA. For example, when misconduct appears, a functional behavioral assessment could be conducted, and determinations could be made as to whether the student's current program is appropriate and whether the student could benefit from the provision of more specialized instructional and/or related services, such as counseling, psychological services, or social-work services in schools. In addition, training of the teacher in effective use of conflict management and/or behavior management strategies also could be extremely effective. In-service training for all personnel who work with the student, and, when appropriate, other students, also can be essential in ensuring the successful implementation of the above interventions.

QUESTION 2: Does the right to a free appropriate public education extend to children with disabilities who are suspended or expelled?

ANSWER: Yes. A free appropriate public education must be made available to all eligible children with disabilities, including children with disabilities who have been suspended or expelled from school. (Section 612(a)(1))

QUESTION 3: What is the meaning of the phrase "children with disabilities who have been suspended or expelled from school"?

ANSWER: The Department believes that the phrase means children with disabilities who have been removed from their current educational placement for more than ten school days in a given school year.

QUESTION 4: Must educational services be continued during the removal of a child with a disability from his or her educational placement for ten school days or less?

ANSWER: No. The Department does not believe that it was the intent of Congress to require that FAPE be provided when a child is removed for ten school days or less during a given school year. However, there is nothing in the IDEA '97 that would prevent the provision of FAPE during this time.

BEST COPY AVAILABLE

QUESTION 5: Must there be a manifestation determination before a student with disabilities can be removed from his or her current education placement for a period of ten school days or less during a given school year?

ANSWER: No. The Department does not believe that the statute requires a manifestation determination prior to a removal for a period of ten school days or less in a given school year. However, if an action that involves the removal of a child with a disability from his or her current educational placement for more than ten school days in a given school year is contemplated, the Department believes that a manifestation determination would be required, and the manifestation determination must take place as soon as possible but in no case later than ten school days after the decision to take that action is made. (615(k)(4)(A))

QUESTION 6: Must a functional behavioral assessment be conducted prior to a removal of ten school days or less during a given school year?

ANSWER: No. The Department does not believe the statute requires a functional behavioral assessment, if a child with a disability is removed from his or her current educational placement for ten school days or less in a given school year, and no further disciplinary action is contemplated.

QUESTION 7: Are there any specific actions that a school district is required to take during a removal of a child with a disability from his or her educational placement for ten school days or less?

ANSWER: If no further removal is contemplated, the Department does not believe that other specific actions are required during this time period. However, school districts are strongly encouraged to review as soon as possible the circumstances that lead to the child's removal and consider whether the child was being provided services in accordance with the IEP and whether the behavior could be addressed through minor classroom or program adjustments, or whether the IEP team should be reconvened to address possible changes to the IEP.

QUESTION 8: Does IDEA continue to allow a school district to seek a court order to remove a student with a disability from school or otherwise change the student's placement? If so, under what circumstances?

ANSWER: Yes. IDEA continues to allow a school district to seek to obtain a court order to remove any student with a disability from school or to change the student's current educational placement if the school district believes that maintaining the student in the current educational placement is substantially likely to result in injury to the student or to others.[1]

---

[1] Honig v. Doe, 108 S. Ct. 592, 606 (1988).

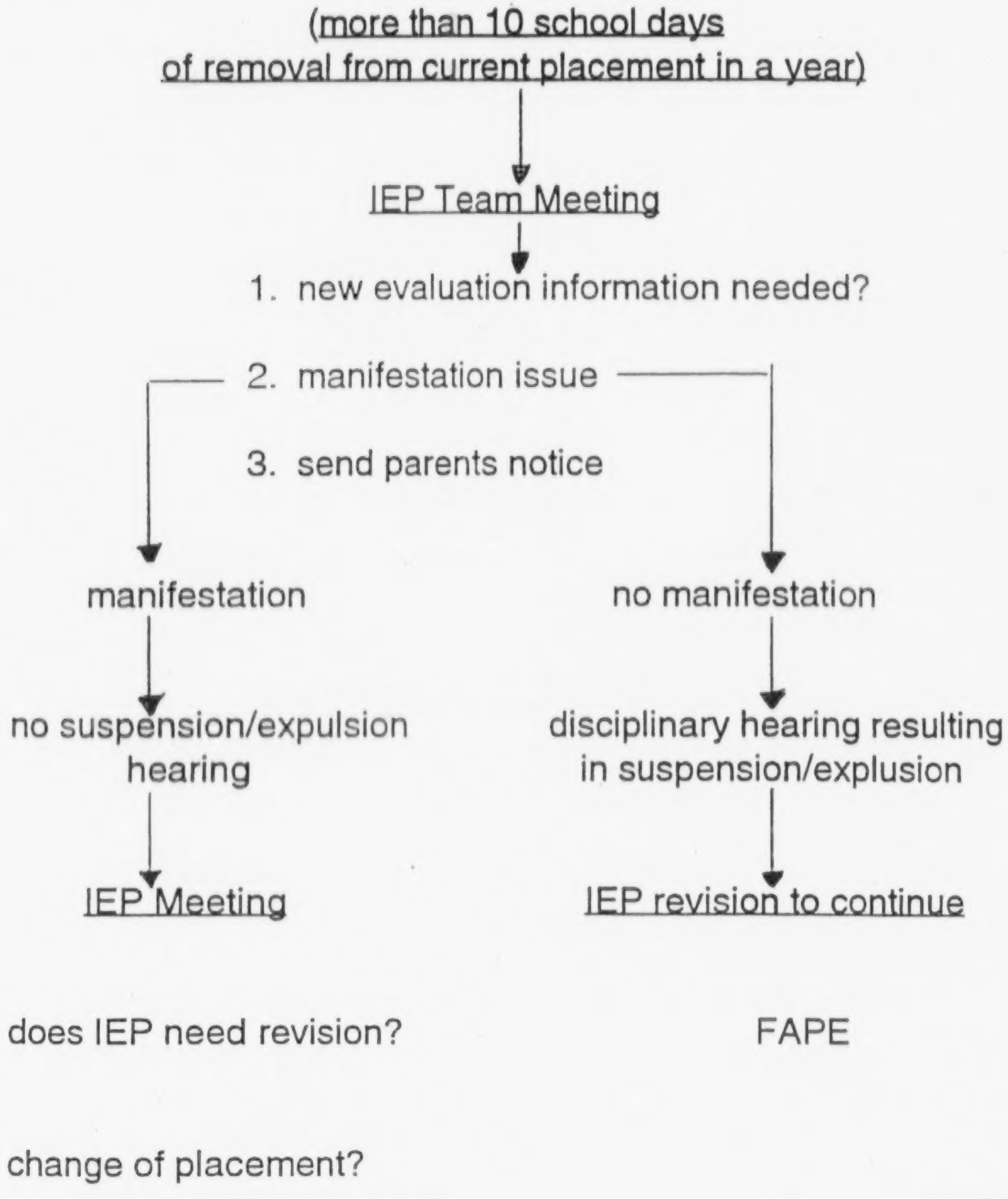
BEST COPY AVAILABLE

In addition, the new statute allows school authorities to ask a hearing officer to move children with disabilities to an interim alternative educational setting for up to 45 days if they are substantially likely to injure themselves or others in their current placement. The hearing officer may move the child to an alternative educational setting if the public agency demonstrates by evidence that is more than a preponderance of the evidence that maintaining the child in the child's current placement is substantially likely to result in injury to the child or others. The hearing officer must consider the appropriateness of the child's placement, whether the school district has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services, and determine that the interim alternative educational setting meets the requirements of section 615(k)(3) of the Act.

cc: State Directors of Special Education
RSA Regional Commissioners
Regional Resource Centers
Federal Resource Center
Special Interest Groups
Parent Training Centers
Independent Living Centers
Protection and Advocacy Agencies

BEST COPY AVAILABLE

Disciplinary Steps



(more than 10 school days
of removal from current placement in a year)

IEP Team Meeting

1. new evaluation information needed?
2. manifestation issue
3. send parents notice

manifestation

no suspension/expulsion hearing

IEP Meeting

does IEP need revision?

change of placement?

no manifestation

disciplinary hearing resulting in suspension/explusion

IEP revision to continue

FAPE

BEST COPY AVAILABLE

Arizona Hearing Officer Training

March 9-10, 1998

Significant Judicial Decisions

I. Free Appropriate Public Education (FAPE)

A. The U.S. Supreme Court in Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al. (102 S.Ct. 3034, IDELR 553:656 (1982)) held that an inquiry in determining whether a FAPE is provided is twofold:

1. Have the procedures set forth in the IDEA been adequately complied with?

2. Is the IEP reasonably calculated to enable the child to receive educational benefits?

B. Where a school district convened an IEP meeting for a student and failed to ensure the attendance of all requisite participants (*i.e.*, the teacher), the student was effectively denied a free appropriate public education. W.G. *v.* Target Range School District, 960 F.2d. 1479, 18 IDELR 1019 (U.S. Court of Appeals, 9th Circuit (1992)).

C. A district offered FAPE to a 19-year-old student with multiple disabilities with its placement in an educational and support services program, which included job-site training. The facts that the district did not implement the program at his neighborhood school or that his IEP lacked a statement of transition services did not interfere with an appropriate education. The failure to include a written statement of transition was merely procedural, as the record clearly showed that the student received and benefited from transition services.

Moreover, the circuit court agreed with the district court that the IDEA did not entitle the student to have those services delivered at his neighborhood school, and that no greater rights in this area existed under Section 504/ADA given the structural similarity between the laws. Urban by Urban *v.* Jefferson County School District R-1, 89 F.3d. 720, 24 IDELR 465 (U.S. Court of Appeals, 10th Circuit (1996)).

II. Least Restrictive Environment

A. The Court of Appeals affirmed the lower court's decision that the least restrictive educational placement for a student who is classified as "moderately mentally retarded" is a regular classroom setting. The Court adopted a four factor balancing test considering:

1. The educational benefits of placement full-time in a regular class;
2. The non-academic benefits of such placement;
3. The effect of the student on the teacher and children in the regular class; and
4. The costs involved. (Sacramento City Unified School District *v.* Holland, (U.S. Court of Appeals, 9th Circuit (January 24, 1994)). *"Review denied by the U.S. Supreme Court."*

B. Under the four-part test adopted in Sacramento City Unified School District *v.* Rachel H., a temporary placement in an off-campus, self-contained program was the least restrictive environment for a 15-year-old student with Tourette Syndrome and Attention Deficit Hyperactivity Disorder (ADHD). The student was not benefiting academically in his mainstream placement, as evidenced by declining achievement. Moreover, the district had offered him supplementary services and accommodations without success. His non-academic benefits were minimal, since he did not model his behavior on that of his non-disabled peers and he remained socially isolated. Evidence of the students' negative effect on others included violent attacks on two students, assault of a staff member, and disruption of the class by profanity and sexually-explicit remarks. Cost considerations in hiring an aide were irrelevant, in light of the determination that this service would not benefit the student. Clyde K. *ex rel.* Ryan K. *v.* Puyallup School District, 21 IDELR 664. (U.S. Court of Appeals, 9th Circuit (1994)).

C. The Court upheld the residential placement proposed by the district for a student who is profoundly deaf. The Court found that the student's great deficits in communication skills and need for immediate, intensive instruction in American Sign Language strongly outweighed the nonacademic benefits of placement in a regular education environment. Poolaw *v.* Bishop, 67 F.3d. 830, 23 IDELR 407 (U.S. Court of Appeals, 9th Circuit (1995)).

D. The Court of Appeals affirmed the decision that the student's neighborhood school was not the least restrictive environment appropriate to meet his needs. In so holding, the Court held that there is no presumption under the IDEA that the neighborhood school is the LRE. Murray v. Montrose County School District, 51 F.3d 921, 22 IDELR 558, (U.S. Court of Appeals, 10th Circuit (1995)).

E. The circuit court reversed a district court decision which concluded a school district failed to accommodate an 11-year-old student with autism in regular education, finding the district court erred when it failed to give "due weight" to the previous administrative proceedings and failed to consider the district's discretion when determining an appropriate program for a student. The district court ignored "overwhelming" evidence that the student made minimal, if any, educational progress while attending the regular education placement. The school district did not fail to accommodate the student, as its accommodation efforts were "extensive." The student was provided with supplementary aids and services which included: the deliberate adjustment of the student's regular education class; curriculum modifications; the hiring and training of a one-to-one aide; extensive training for the teachers who worked with the student; and the hiring of a consultant who specialized in autism. These efforts were more than appropriate according to the circuit court, and the district court's rejection of these efforts was characterized as the adoption of a "potential maximizing standard" in contrast to the applicable *Rowley* educational benefit standard. Another error by the district court was its failure to consider the effects of the student's repetitive, disruptive behavior on the classroom, as required by precedent. The proposed district IEP was appropriate, as it provided the student with both educational benefit and mainstreaming opportunities. Hartmann by Hartmann v. Loudown County Board of Education, 26 IDELR 167 (U.S. Court of Appeals, 4th Circuit (1997))

III. Unilateral Placements

A. The U.S. Supreme Court in Burlington, MA v. Department of Education *et al.*, 105 S.Ct. 1996, IDELR 556:389 (U.S. 1985), held that parents may be awarded reimbursement of costs associated with an unilateral placement if it is found that:

   a. the school district's IEP is not appropriate; and

   b. the parent's placement is appropriate

BEST COPY AVAILABLE

c. equitable factors may be taken into consideration. (*See* B.G. v. Cranford Board of Education, (702 F.Supp. 1158, IDELR 441:327 (D NJ 1988)).

B. Parental placement at a school which is not state approved or does not meet the standards of the state does not itself bar public reimbursement under the Burlington standard. Florence County School District Four *et al. v.* Carter, 114 S. Ct. 361, 20 IDELR 532 (U.S. 1993).

C. Due to a district's failure to provide an appropriate placement to a 16-year-old student with a specific learning disability (SLD), attention deficit disorder and a conduct disorder, his parents were entitled to reimbursement for tuition and transportation at the private school where he was unilaterally placed by his parents. The district reduced the amount of time the student spent in special education despite the student's failing grades and other evidence which indicated that the district's educational program was insufficient to meet his needs due to its lack of structure, individualized attention, and behavior management. The student progressed academically at the private school where he received increased attention and a behavior management plan, and thus it provided an appropriate placement for the student. Capistrano Unified School District *v.* Wartenburg, 22 IDELR 804 (U.S. Court of Appeals, 9th Circuit (1995)).

D. The appropriate placement for a student with emotional and behavioral disabilities was a residential placement, as opposed to the day placement proposed by the district. The student was not receiving an educational benefit from her placement in the district, as she was regressing. Nor was she receiving a non-academic benefit, as she seriously disrupted the classroom and had been expelled. The court accepted the testimony of the student's medical experts that a residential placement was the most appropriate placement. Thus, the district was required to pay for the student's nonmedical costs at the residential placement. Seattle School District No. 1 *v.* B.S., 24 IDELR 68 (U.S. Court of Appeals, 9th Circuit (1996)).

E. In an appeal of a decision awarding reimbursement for an unilateral placement made by the parent, the Court refused to address the eligibility issue raised on appeal since it was not an issue at the initial hearing. In addition, the Court held that the Hearing Officer correctly applied the standard for measuring educational benefit under the IDEA. The standard is not merely whether the placement is "reasonably calculated to provide the child with educational benefits", but rather whether the child makes progress toward the goals set forth in her IEP which is not limited to academic needs, but can include social and emotional needs that affect academic progress, school behavior and socialization. County of San Diego v. California Special Education Hearing Offices, 24 IDELR 756 *United States Court of Appeals, 9th Circuit (1996))

IV. Private Schools

A. The 7th Circuit upheld its previous decision finding the new IDEA amendments did not require the school district to provide the student with the instructional aide on the premises of her parochial school. The court noted that under the amendments to the IDEA, school districts are required to offer a FAPE to all students with disabilities, but if a FAPE is offered at a public school and the parents voluntarily choose to enroll the student in a private school, the school district is not obligated to offer "comparable" services at the private school. In this case the district offered the student the services of the instructional assistant at the public school, but the parents refused this offer, instead choosing to enroll the student in a parochial school. Accordingly, the district complied with its IDEA obligations and was not required to provide the student with an instructional assistant at the parochial school. The court rejected the parents' assertion that the district violated the First Amendment when it refused to provide the student with the instructional assistant on the grounds of the parochial school. In the court['s view, the district's actions did not infringe upon the student's exercise of religion or indicate any disapproval of the student's religious preferences. K.R. v. Anderson Community School Corp., 26 IDELR 864 (U.S. Court of Appeals, 7th Circuit (1997))

B. The circuit court reversed its original opinion and concluded the board was not obligated under the IDEA to provide a 14-year-old student with a hearing impairment with the requested sign language interpreter at the parochial school the student's parents voluntarily enrolled him in. In reaching this decision, the court considered the recent IDEA amendments and the position of the U.S. Department of Education. The IDEA amendments require local education agencies to provide parentally enrolled private school students with a "proportional share of federal funding." The court noted that under the DOE's view, the IDEA does not require a school district to expend its non-federal funds for the provision of special education services to student voluntarily enrolled in private schools. LEAs are required to provide these students with a FAPE, but once a FAPE has been offered, the LEA has no further obligation to parentally-placed private school students. Since the board offered the student a FAPE in the public schools, the board was not required to provide the student with the requested onsite interpreter services under the IDEA. Cefalu *ex rel.* Cefalu v. East Baton Rouge Parish School Board, 26 IDELR 166 (U.S. Court of Appeals, 7th Circuit (1997))

C. The court stated that the 1997 IDEA amendments require districts to provide voluntarily enrolled private school students with a proportionate amount of federal IDEA funds. The court determined it was unclear whether students with disabilities voluntarily enrolled in private schools are entitled to an "equal share" or a proportionate amount allocated collectively. Another uncertain area was what special education and related services districts were required to provide to voluntarily enrolled private school students with disabilities. As a result of these uncertainties, the circuit court remanded the dispute back to the district court for further proceedings. Fowler v. Unified Sch. Dist. No 259, 26 IDELR 1301 (U.S. Court of Appeals, 10th Circuit (1997))

V. Related Services

A. The United States Supreme Court Decision - Irving Independent School District v. Tatro, 104 S.Ct. 3371, IDELR 555:511 (1984)

1. The United States Supreme Court established three-prong test for determining whether a particular service is considered a related service under the IDEA. To be entitled to a related service:

   a. A child must have a disability so as to require special education under the IDEA;

   b. The service must be necessary to aid a child with a disability to benefit from special education; and

   c. The service must be able to be performed by a non-physician.

B. A school was ordered to provide a student with individual nursing services as a related service in his IEP. The court followed a "bright line" rule in the Tatro case. Since the services were not required to be administered by a doctor and were supportive services necessary for the student to attend school, they were required related services. Cedar Rapids Community Sch. Dist. *v.* Garret F., 25 IDELR L139 (U.S. Court of Appeals, 8th Circuit (1997)).

C. Student who suffers from cystic fibrosis and tracheomalacia requiring speech therapy, periodic medication, suctioning of his/her lungs and reinsertion of tracheostomy tube is entitled to those services under the IDEA -B to benefit from special education in the least restrictive environment, a public school setting. Department of Education, State of Hawaii v. Katherine D., 727 F.2d. 809, IDELR 555:276 (U.S. Court of Appeals, 9th Circuit (1984)).

D. Extensive therapeutic health services including medication administered through a tube, ingestion of saline solution into lungs, suctioning of mucus and continuous supply of oxygen do not constitute related services; they more closely resemble "medical services" even through such services need not be performed by a physician. Detsel v. The Board of Education of the Auburn Enlarged City School District, 637 F.Supp. 1022, IDELR 557:335 (ND NY 1986); aff'd 820 F.2d. 587, IDELR 558:395 (U.S. Court of Appeals, 2nd Circuit (1987)). *See also* Granite School District v. Shannon M., 18 IDELR 772 (D. Utah (1992)).

Section D

PROCEDURAL ISSUES

ARIZONA HEARING OFFICER TRAINING: PROCEDURAL ISSUES IN DUE PROCESS HEARINGS

Presented by:

Janice A. Grant
Senior Administrative Law Judge
Seattle, Washington
March 1998

I. INTRODUCTION

A. Due Process

We've all heard the term "due process", but what does it mean? And what is its importance in special education hearings? In the judicial context, due process is a course of legal proceedings according to established rules and principles for the enforcement and protection of private rights. The essential elements of due process are notice and an opportunity to be heard and to defend.

To give such proceedings any validity, there must be a competent forum to render a judgment upon the subject matter of the action. In the special education arena, the "forum" is a due process hearing.

The person appointed to conduct the administrative hearing on the disputed issue(s) is the due process hearing officer. The hearing officer's responsibilities include conducting a fair and impartial hearing and making a decision based on the application of the law to the evidence (facts) presented at the hearing. The focus of this outline is to provide an overview of the hearing process and the process by which hearing officers make decisions.

B. Statutory and Regulatory Requirements

1. Individuals with Disabilities Education Act (IDEA) - 20 USC Sec. 1415
   34 CFR 300.506 through 300.515
2. Arizona Statutes (A.R.S. 15-101 *et seq*)

C. Administrative vs. Judicial Proceedings

In administrative hearings, generally:

1. Procedures are less formal. In most states, the rules of evidence are relaxed (e.g., hearsay evidence is admissible, and affidavits and telephone testimony are permitted at the hearing officer's discretion).

2. Timelines are observed, thereby expediting the hearing and decision. Parties should be mindful, however, that the timelines for the hearing and/or the decision can be continued by the hearing officer for good cause shown by either party.

3. The hearing officer has substantial discretion regarding how the hearing is conducted, including examining witnesses. However, his/her authority is limited by the enabling statute and regulations (e.g., the hearing officer cannot declare an agency rule unconstitutional and cannot award attorneys' fees).

4. The hearing officer, although usually not an expert in special education, must be trained in that area of law.

5. There are few "Perry Mason"-type surprises due to the "five day" rule and prehearing conferences.

II. PRIOR TO THE HEARING

A. Impartial Hearing Officer - 34 CFR 300.507

The skills and qualifications of hearing officers vary widely. The process by which hearing officers are appointed also varies from state to state. Nevertheless, every impartial hearing officer is required to be:

1. Unbiased - Not prejudiced for or against;

2. Disinterested - No personal or professional interest which would conflict with objectivity in the hearing;

3. Independent - Not an employee or agent of the SEA or LEA involved in the education or care of the student at issue;

4. Trained - As to applicable state and federal special education laws.

5. Other considerations:

a. 34 CFR 300.507(2)(b) provides that a person otherwise qualified to conduct a due process hearing is not considered an "employee" of the agency solely because he or she is paid by the agency to serve as a hearing officer.

b. 34 CFR 300.507(c) provides that each public agency shall provide a list of persons who may serve as hearing officers, including a statement of the qualifications of each of those persons.

c. A hearing officer may be removed from the case based on a showing that s/he is not "impartial" as defined above. The party may also appeal an administrative decision on the basis that the hearing officer was not impartial. Arons, 16 IDELR 1028 (OSERS 1990).

6. Judicial/Administrative Decisions

a. The parents of preschool students with autism challenged the impartiality of New York's due process hearing system based on the following: the manner in which the board appointed hearing officers; the destruction of the original handwritten hearing officer decisions by board employees; the fact that hearing officers are "de facto employees" of the board; and the policy that hearing officers be attorneys. The parents' claim was dismissed on the basis that the parents failed to provide the state department of education with proper service of the claim and failed to file the claim in a timely manner (i.e., the claim was filed three months after the four-month statute of limitations borrowed from state law had expired) *Berkowitz by Berkowitz v. New York City Bd. of Educ.*, 23 IDELR 1176 (E.D.N.Y. 1996).

b. Parents requested a hearing on issues of classification and placement. Prior to the hearing, the hearing officer refused to provide the parents with his credentials and resume, issue four subpoenas, and rule on a motion to recuse. Parents then withdrew their request; however, a hearing was held in abstentia and a decision was rendered. Review Officer declared the decision a nullity since the request for hearing was withdrawn. Minisink Central Sch. Dist., 16 IDELR 331 (SEA NY 1989).

c. Where a hearing officer held ex parte conversations with defense witnesses prior to the due process hearing, impartiality of the hearing was tainted and the decision of the hearing officer must be annulled. *Hollenbeck v. Bd. of Educ. of Rochelle Township*, IDELR 441:281 (ND IL 1988).

d. Hearing Officer's telephone conversation with director of private residential school prior to rendering a decision in a pending hearing constituted ex parte communication which violated the due process rights of the disabled student and parents. *Murphy v. The Commonwealth of Pennsylvania*, IDELR 554:527 (1983).

B. Right to Initiate Hearing - 34 CFR 300.506

1. Who can request a hearing?

A parent or a school district may initiate a due process hearing. 34 CFR 300.506(a).

Judicial/Administrative Decisions

a. A hearing officer dismissed a due process request filed by a non-custodial parent which contended that the school district was required to fund the costs of a private placement, and said that his sole legal remedy lay in family court. The custody order left the parent with no legal right or responsibility over the student's educational decisions, and therefore the parent did not have standing to request a due process hearing to contest the student's education. In Re T.C., 25 IDELR 1245 (SEA VT 1997); see also North Allegheny School District, 26 IDELR 774 (SEA PA 1997); Andalusia City Bd. Of Educ., 22 IDELR 666 (SEA AL 1995).

b. An incarcerated 16-year-old student with an unspecified disability was entitled to a due process hearing. The denial of the hearing request was based on a previous state statute, which was changed during the course of the proceedings. Since the parents exhausted administrative remedies with respect to their claim for a hearing, the court determined it had jurisdiction over the request for a hearing. The court stated it would schedule the hearing at a later date. *Paul Y. by Kathy Y. v. Singletary*, 27 IDELR 1 (S.D. Fla. 1997).

c. An incarcerated student with a learning disability was entitled to a due process hearing regarding a claim that he had been denied FAPE while a student in the district. The fact that he no longer resided in the district did not abridge that right in any regard or render the need for a due process hearing moot, as his claim related to past services provided at a time when he was a resident in the district. *H.M. v. Special School District No. 1*, 24 IDELR 159 (Minn. Ct. of Appeals (1996)).

d. If an agreement cannot be reached between the school district, parents, and student on the statement of transition services in the student's IEP, either the parent or the school district may request an impartial due process hearing according to the procedures at 34 CFR 300.506-.508. Letter to Bereuter, 20 IDELR 536 (OSERS 1993).

e. In order the insure the procedural safeguards incorporated in both state and federal special education law, the parents of a student with disabiities could not be denied their right to appeal a hearing officer's decision, despite the existence of a prehearing agreement to the contrary. Fond du Lac Sch. Dist., 20 IDELR 203 (SEA WI 1993).

f. A parent with joint custody, but without physical custody of the child, has a right to commence a due process hearing absent a court order or statutory provision to the contary. Lower Moreland Township Sch. Dist., 18 IDELR 1160 (SEA PA 1992).

g. A local school district does not have standing to sue the state education agency (SEA) under the IDEA to force the SEA to provide needed services. *Andrews et al v. Ledbetter et al*, 880 F.2d 1287, IDELR 441:573 (U.S. Ct. of Appeals, 11th Cir. (1989)).

h. The Alabama State Departments of Mental Health and Mental Retardation, as public agencies responsible for providing education to children with a disability, are proper parties to a due process hearing pursuant to the IDEA. Jason W., IDELR 508:354 (SEA AL 1987).

i. Parent's motion to join the Departments of Mental Health and the Department of Youth Services was denied where interagency agreements and state law provide that the agencies were responsible only for the student's psychiatric hospitalization, not his education, and therefore were not required to furnish the student with protections under the IDEA. Case No. 86-0103, IDELR 507:445 (SEA MA 1986).

2. Issues in a hearing - 20 USC Sec. 1415(b)(1)(E); 34 CFR 300.506(a)

A hearing may be requested to address any matter relating to the student's:

(1) identification;

(2) evaluation;

(3) educational placement; or

(4) provision of FAPE.

Judicial/Administrative Decisions

a. Determinations of whether particular issues are within the jurisdiction of an IDEA or whether a party has been properly named in any hearing request are the exclusive province of the impartial due process hearing officer. OSEP Letter to Wilde, (October 3, 1990).

b. The appeals panel determined it lacked jurisdiction over the parents' appeal of a school district's decision denying their request that the district provide their child, a student with spina bifida, catheterization services at her private school, finding the student was not eligible for special education. Although the student had a disability, her disability did not adversely affect her education. Therefore, she did not require special education services, and, on that basis, the hearing officer lacked subect matter jurisdiction over the dispute. Thus, the appeals panel also lacked jurisdiction over the dispute. Susquehanna Sch. Dist., 26 IDELR 779 (SEA PA 1997).

c. The parents asserted that two of their children should have been tested for special education before being required to repeat the eighth grade. The court noted the district attempted to obtain the parents' consent to such testing on several occasions and were refused every time. The court stated the district was not required to request a due process hearing to obtain permission to test the children, despite the parents' assertion to the contrary. The court further stated that no protected property or liberty right existed, no hearing was required, and the parents were given an opportunity to discuss the decision with the appropriate district personnel. *Hartfield v. East Grand Rapids Pub. Sch.*, 26 IDELR 1 (W. D. Mich. 1997).

d. An appeal of a hearing officer's decision was not moot despite the parents' removal of a special education student from the district and her enrollment in another public school system, since removal of a student from a school system does not per se preclude a parent from challenging a prior decision, and the parent was seeking compensatory education. Bd. of Educ. of the City of New York, 26 IDELR 1326 (SEA NY 1997).

e. The hearing officer concluded she lacked jurisdiction over the parent's request to change the student's educational records. The proper forum for resolution of this type of dispute was a hearing in accordance with FERPA and its regulations. The hearing officer's jurisdiction was limited by the IDEA to matters involving the identification, evaluation, or educational placement of a student. Houston Indep. Sch. Dist., 26 ISELR 817 (SEA TX 1997).

f. A hearing officer was ordered to reconsider a prior decision granting a district's motion to limit the scope of a due process hearing to the issue of whether the parents of a student enrolled in private school were entitled to tuition reimbursement for the current year, since the parents had not been permitted to present evidence concerning the timeliness of their claim for tuition reimbursement for the preceding two years. Bd. of Educ. of the Hyde Park Cent. Sch. Dist., 26 IDELR 1329 (SEA NY 1997).

g. The district's failure to agree to a second due process hearing on the issue of whether the district was required to provide the student with transportation to the private school was not a procedural error, since the dispute related to the first due process hearing, and therefore, should have been raised during those proceedings. Accordingly, the parents were estopped from alleging the district committed procedural error when it refused to grant the parents' request for another due process hearing. *Heather S. by Kathy S. v. State of Wisconsin*, 26 IDELR 870 (7th Cir. 1997).

h. A settlement agreement between a parent and a school district was not the equivalent of administrative exhaustion; therefore, a parent's claims disputing the evaluation and placement of her child who was mentally retarded were dismissed by a federal court. The settlement took place in lieu of the due process hearing, and there was no stipulation that the agreement operated as an appealable decision. Further, there was no indication that the settlement agreement alleviated the need for administrative review. *Hamilton v. Bd. of Sch. Commissioners of Mobile County, Ala.*, 23 IDELR 350 (S.D. Ala. 1996).

i. A hearing officer exceeded his authority when he ruled on the appropriateness of the board's services and ordered implementation of an education program and reclassification of a student. Those issues were not properly raised at the due process proceeding and the decision was annulled on those grounds. The only issue before the hearing officer was whether the board had provided the student with the related services it had recommended, which it had. Bd. of Educ. of the City Sch. Dist. Of the City of New York, 23 IDELR 744 (SEA NY 1995).

j. A parent's complaints regarding minority placement in math classes and the absence of a pre-Algebra class for minorities were dismissed as outside the scope of a hearing officer's authority. Dallas Indep. Sch. Dist., 21 IDELR 233 (SEA TX 1994).

3. Is the party's request for a hearing time-barred?

a. The Parents' request for due process was timely under the applicable statute of limitations which governed the claim. Based on the authority of other due process decisions in the state, the request for due process had to be made within two years from the accrual of the cause of action--in this case the student's removal from the district--and it did fall within this time period. Bexley City School District, 25 IDELR 899 (SEA OH 1997).

b. The hearing officer concluded the appropriate statute of limitations for due process claims was the five year state "catchall" statute of limitations. Applying the limitations period to the facts of the case, the hearing officer concluded none of the parents' claims were barred. Jonesboro Pub. Schs., 26 IDELR 1073 (SEA AR 1997).

c. The hearing officer concluded the parents' challenge to a past psychological assessment of an 11-year-old student with an SED was time-barred. The claim was not raised within two years of the assessment, therefore, it was barred by the applicable statute of limitations. Pasedena Indep. Sch. Dist., 26 IDELR 690 (SEA TX 1997).

d. A request for due process, which was filed by a parent over two years after a student's graduation, was dismissed as untimely. The applicable state statute of limitations which governed the claim was two years, and the claim accrued from the termination of the student's services. Medina City Sch. Dist., 24 IDELR 405 (SEA OH 1996).

4. Mediation - 20 USC 1415(e)

a. What is mediation? Mediation is an informal yet structured meeting of concerned parties facilitated by an impartial third party trained in mediation/conflict resolution techniques. The goal of mediation is an agreement which is acceptable to all parties. Implementation of an agreement reached in mediation is based on good faith of the parties and is not legally binding.

b. Why mediate? Mediation is useful in facilitating communication between parents and school district personnel and resolving differences prior to going to the expense and oftentimes mental anguish of a hearing.

c. Mediation is encouraged, but is NOT mandatory and is not to be considered a process to waive or preempt a student's rights. Its value is as an additional resource to parents and school districts in negotiating and planning special education programs and services. A list of trained mediators is required to be available through the state and local educational agencies.

5. "Stay put" provision - 34 CFR 300.513

a. During the pendency of any administrative or judicial proceeding involving the complaint (including the due process hearing), the student remains in his or her current educational placement unless the parties agree otherwise. 34 CFR 300.513(a).

(1) For stay put purposes, "current educational placement" has been construed to mean the student's placement at the time the request for hearing was made.

(2) The stay put provisions do not preclude a school district from using its normal procedures for dealing with students who are endangering themselves or others.

b. Prehearing conferences are useful in determining the student's current, or interim placement, during the pendency of a due process hearing.

c. If the complaint involves an application for initial admission to public school, the student, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings. 34 CFR 300.513(b).

Judicial/Administrative Decisions

a. A hearing officer denied the district's request to change the placement of a ninth grader with ADHD pending the completion of due process, finding the district failed to demonstrate by substantial evidence that the student was a danger to himself or others. Although the student's behavior was inappropriate, it was not dangerous. It was unclear whether the student actually threatened to physically harm the assistant principal. The hearing officer noted that "far more serious and on-going behavior" was required before the district could change the student's placement pending the due process hearing. Since the district failed to demonstrate the student was a danger, the hearing officer concluded the student could remain in his current, regular education placement pursuant to the stay put provision. Cabot Sch. Dist., 27 IDELR 304 (SEA AR 1997).

b. The ALJ determined the stay-put placement for a 16-year-old student with multiple disabilitites was his current, out-of-state residential placement, not the proposed in-state residential placement. This conclusion was based on the fact that the last agreed to IEP for the student called for his placement at the out-of-state facility. Additionally, the stay-put placement must be capable of implementing the student's last agreed-to IEP, and the in-state facility was not capable of implementing that IEP. Muscogee County Sch. System, 27 IDELR 275 (SEA GA 1997).

c. A student who was over the age of 21 could not invoke the protections of the stay-put provision. The IDEA's provisions were limited to minors with the exception of the judge-created remedial exception of compensatory education. Thus, the statute's age limitations were presumptively carried over into the stay-put provision which was silent on that subject. *Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Illinois State Bd. of Educ.*, 23 IDELR 1118 (U.S. Ct. of Appeals, 7th Cir. (1996)).

d. The stay-put provision of the IDEA provides for automatic preliminary injunction to maintain the student in his/her current educational placement during administrative and judicial proceedings. Therefore, an injunction is granted despite the parents' failure to meet the test for a standard injunction. *Cochran v. The District of Columbia,* 660 F.Supp. 314, IDELR 558:443 (D DC 1987).

C. Right to Counsel/Advocate - 34 CFR 300.508(a)(1)

1. Parties to a due process hearing may choose to be accompanied by any person. However, if that person has no knowledge of special education law or state administrative procedures, the hearing officer can limit that person's role to offering advice.

2. Parents must be made aware of any free or low-cost legal services in the area, including attorneys and advocates. A list of such services should be made available by the state and/or local education agencies.

3. School districts are generally represented by counsel. The hearing officer has an affirmative duty to develop a full and fair record of the proceedings, and may ask more questions of the parties and witnesses if one or both parties appear pro se than if the parties are represented.

D. Five Day Rule - 34 CFR 300.508(a)(3)

1. The rule

Any party to a hearing has a right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing. This rule also applies to disclosure of all evaluations completed at least five business days prior to the hearing date, and the recommendations based on that party's evaluations that the party intends to use at the hearing. 20 USC 1415(f)(2).

2. Differing Interpretations

Both the courts and hearing officers have differed regarding the rule's interpretation. Most forums agree that a party that fails to comply with five-day disclosure of evidence is precluded from introducing that evidence. However, it is within the hearing officer's discretion to determine, for example, if the opposing party had actual knowledge of the information in a timely fashion, and whether that knowledge constitutes the functional equivalent of written disclosure.

3. Listing a witness or exhibit does not obligate a party to either call the witness or introduce the document; but it offers the opportunity to do so. The names of witnesses to be called and the general thrust of their testimony should be disclosed. See Bell, IDELR 211:166 (IDEA 1979).

4. When a party to a hearing has been unsuccessful in meeting the five-day rule, the hearing officer may grant the party's request for a continuance in order to provide the opposing party with an opportunity to review the evidence or testimony which was not properly disclosed or may deny the request for a continuance and simply prohibit the introduction of the evidence. OSEP Policy Letter, 18 IDELR 739 (1991).

5. The hearing officer will typically inform the parties of the five-day rule in the prehearing conference as well as the notice of the hearing.

E. Other Prehearing Considerations

1. Prehearing Conferences

a. Define issues and relief sought for hearing;

b. Stipulate to facts/documents;

c. Address the five-day rule and arrange for dates of exchanging witness and document lists;

d. Discuss procedural issues, rules of evidence, burden of proof, time, location and estimated length of hearing;

e. Determine whether the parents want the hearing to be open or closed to the public and whether the parents want the student present at the hearing;

f. Determine whether to sequester witnesses.

2. No ex parte communication

Conversations between the hearing officer and either party without the other party's participation are prohibited. Exception: procedural questions.

3. Continuances/Delays/Nonappearance at Hearing

a. Continuances may be granted upon a showing of good cause by either party. The parties should always be mindful of the 45-day timeline for a decision to be mailed from the date of the request for hearing. 34 CFR 300.512.

b. If a party fails to appear at the hearing, the hearing officer has the discretion to attempt to contact that party regarding the nonappearance, and either proceed with the hearing, continue the hearing, or issue a Default or Dismissal Order if the nonappearing party is also the party requesting the hearing.

c. Judicial/Administrative Decisions

The state review officer reversed the hearing officer's decision, finding that it was an abuse of the hearing officer's discretion to continue the due proces hearing until a status report regarding the parent's appeal to the Commissioner of Education challenging the hearing officer selection process could be obtained. The review officer noted the parent was not represented by an attorney, and that the issues before the hearing officer did not require an immediate decision. According to the review officer, fairness required giving the parent an opportunity to present her claims. Therefore, the decision of the hearing officer was annulled and a new hearing was ordered. Board of Education of the William Floyd Union Free School District, 25 IDELR 1141 (SEA NY 1997).

4. Discovery/Subpoenas

a. Discovery is normally not necessary for due process hearings, and some states' regulations actually prohibit discovery in these proceedings. The hearing officer has discretion to compel or limit discovery, and should remind the parties of the tight timelines in these cases (e.g., depositions should be taken as soon as possible after the request for hearing is received to prevent delay of the hearing).

b. Judicial/Administrative Decisions

Whether it is permissible for school districts to request parents to answer interrogatories/produce documents prior to a due process hearing falls within the discretion of the hearing officer, and may be regulated by state or local rules/procedures, since the IDEA itself does not include any discovery rules. Letter to Stadler, 24 IDELR 973 (OSEP 1996).

A hearing officer issued a pre-hearing order allowing the district access to the student's records at a private school as a discovery procedure in order to prepare for the due process hearing. It was held that this was a matter of fundamental fairness. N.H. Case No. 90-51, 16 IDELR 1340 (SEA NH 1990).

c. Subpoenas - Either party has the right to compel the attendance of witnesses. 34 CFR 300.507(a)(2). Although the federal regulations give the hearing officer the authority to compel, the hearing officer does not have authority to enforce the subpoena of witnesses. However, the legal counsel for the party exercising this right may go through the courts to enforce the subpoena of a witness.

A due process appeals review panel rejected the parents' argument that they were prejudiced by the level I hearing officer's failure to subpoena a compliance officer. The panel ruled that the hearing officer did not abuse his discretion in deciding not to compel the compliance officer's attendance. Burgettstown Area School District, 26 IDELR 336 (SEA PA 1997).

5. Interpreters

Interpreters, including sign language and foreign language interpreters, can participate in the hearing for the benefit of any party or witness.

III. DURING THE HEARING

A. Overview and Procedures

1. Hearings are normally recorded by a court reporter.
2. The hearing officer provides a brief procedural background of the case, introduces the parties, and rules on preliminary motions.
3. Opening statements.
4. Direct and cross-examination of each witness. The hearing officer rules on all objections.
5. Rebuttal testimony, if any.
6. Closing statements (either oral or written briefs).

Judicial/Administrative Decisions

A local hearing officer denied a parent due process by refusing to allow her to examine notes used by the district's witnesses when they testified, failing to provide her with an adequate opportunity to cross-examine one of the district's witnesses, and improperly admitting district evidence which was not properly disclosed prior to the hearing. To address these violations, a due process review board evaluated the district's testimony in light of the violations, and accepted only those findings of the local hearing officer which were stipulated to by the parties. Somerset County Public Sch. System, 21 IDELR 942 (SEA MD 1994).

The school district has a right to review any written information an expert witness uses prior to or during her testimony to refresh her recollection. The expert has waived any procedural protection by privileged communication. The plaintiffs should not be able to use the privilege as "both a sword and a shield." *I.D. v. Westmoreland Sch. Dist.*, 17 IDELR 417 (D NH 1991).

B. Hearing Officer Scope of Authority

1. Substantial discretion

   a. The hearing officer may admit and give probative effect to evidence which has probative value commonly accepted by reasonably prudent persons in the conduct of their affairs.

   b. The hearing officer must give effect to rules of privilege recognized by law. S/He must exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.

2. Additional matters within the hearing officer's authority:

   a. Determine the order of presentation of evidence;

   b. Administer oaths/affirmations;

   c. Rule on procedural matters, objections, and motions;

   d. Rule on offers of proof and receive relevant evidence;

   e. Question witnesses called by the parties in an impartial manner to develop any facts deemed necessary to fairly and adequately decide the matter;

f. Call additional witnesses and request additional exhibits deemed necessary to complete the record, and receive such evidence subject to full opportunity for cross-examination and rebuttal by all parties;

g. Take any appropriate action necessary to maintain order during the hearing;

h. Permit or require oral argument or briefs and determine the time limits for submission thereof;

i. Take any other action necessary and authorized by any applicable statute or rule;

j. Waive any requirement of these rules unless a party shows that it would be prejudiced by such a waiver.

3. Judicial/Administrative decisions:

a. The court concluded the hearing officer lacked authority to issue the orders which required the Department of Corrections to take certain actions regarding its system for providing special education services to incarcerated students with disabilities. The subject of the due process hearing was the student's special education program and whether the district was required to provide him with special education services, not the department's procedures for furnishing services. *State of Connecticut - Unified Sch. Dist. No. 1 v. State Dept. of Educ.,* 27 IDELR 3 (Conn. Super. Ct. 1997).

b. An appeals panel reversed a hearing officer's order requiring the district to fund an independent evaluation of a 12-year-old gifted student to determine whether the student qualified for special education under the category of health impaired, based on his suspected attention deficit disorder. The inclusion of an evaluation in a final order was deemed inappropriate where the parties failed to raise the issue prior to the final decision and where the hearing officer lacked the requisite information to make a determination concerning the issue for which the evaluation was ordered. Conrad Weiser Area Sch. Dist., 27 IDELR 100 (SEA PA 1997).

c. A hearing officer determined that state law did not give him the authority to mandate the participation of other state agencies in the funding of a residential placement for the student. The district was ordered to pay for the student's placement. Ellsworth Pub. Schs., 26 IDELR 1084 (SEA ME 1997).

d. An appeals panel determined that a student was not denied FAPE based on the level I hearing officer's failure to schedule a hearing within 30 days of the

BEST COPY AVAILABLE

parents' due process request, since the evidence established that the student was not deprived of a meaningful educational benefit, and the actions of the parents' attorneys contributed to the scheduling delay. Punxsutawney Area Sch. Dist., 26 IDELR 1349 (SEA PA 1997).

e. The parents' request that the district reimburse them for the cost of services provided by educational consultants over several years was denied, since hearing officers are not authorized to award this type of reimbursement. Manhattan Beach Unified Sch. Dist. and SELPA, 26 IDELR 457 (SEA CA 1997).

f. A hearing officer denied a parent's request for reimbursement of witness fees finding the state education code did not authorize such an award. Los Angeles Unified Sch. Dist., 26 IDELR 618 (SEA CA 1997).

g. It was proper for the hearing officer to make her own independent determination that the IEP was appropriate as hearing officers possessed the necessary expertise to do so. *Roy and Anne A. Ex rel. Matt A. v. Valparaiso Community School*, 25 IDELR 413 (N.D. Ind. 1997).

h. Although the IDEA itself imposes no deadline within which tuition reimbursement claims must be brought, the parents did not file a complaint via due process until almost five years after the private placement of the student. The mere notice of their dissatisfaction did not constitute a formal complaint. Thus, summary judgment was granted in favor of the school district as to the first three years of tuition and related services expenses. A hearing was ordered as to the final school year in question because factual issues remained regarding whether the private school was an appropriate placement given the IDEA's mainstreaming preference. *Phillips ex rel. Phillips v. Board of Education of the Hendrick Hudson School District*, 25 IDELR 500 (S.D.N.Y. 1997).

i. A hearing officer granted the district's motion to dismiss the parents' request for a due process hearing, finding the parents' claims related to the U.S. Constitution and the Civil Rights Act were outside the jurisdiction of the hearing officer. Further, since some of the claims involved issues which had already been settled through the Office of Civil Rights, and since the settlement agreement dismissed all of the parents' claims, the parents could not relitigate the same issues by requesting a due process hearing. Sherwood School District, 25 IDELR 1254 (SEA OR 1997).

C. Right to Present Evidence and Cross-Examine Witnesses - 34 CFR 300.508(a)(2)

1. The parents of an 18-year-old student with multiple disabilities and the school district both appealed the decision of a hearing officer dismissing the parents' claims regarding the appropriateness of two prior IEPs created for the student, and requiring the district to provide the student with one year of compensatory transition services. An appeals panel vacated the hearing officer's orders, finding that the parties were deprived of due process when the hearing officer rendered a decision without providing the parties an opportunity to present any evidence. Salisbury Township Sch. Dist., 26 IDELR 919 (SEA PA 1997).

2. An appeals panel concluded that the hearing officer did not err when he refused to admit certain test results as evidence on the last day of a due process hearing. Since hearing officers have discretion regarding what evidence to admit, the refusal to admit the report was not reversible error. Wissahickon Sch. Dist., 26 IDELR 1371 (SEA PA 1997).

3. The decision whether to allow parents to admit testimony by telephone at a due process hearing falls within the hearing officer's discretion. If a party objects to that decision, the party can seek review of that determination through an administrative appeal, or, if applicable, a civil action. Letter to Anonymous, 23 IDELR 1073 (OSEP (1995)).

4. A school district utelized a videotape of the student's behavior as an exhibit in a due process hearing. The taping was done without the consent of the student or parents. The Court held videotaping in public areas does not violate the constitutional right of privacy or FERPA. *M R v. Lincolnwood Bd. of Educ., District 74*, 843 F.Supp. 1236, 20 IDELR 1324 (N D Ill. 1994).

5. The Court found that the hearing officer's decision failed to directly address the procedural and substantive challenges to the IEP made by the parents. Thus, the parents were allowed to present additional evidence at trial. *Norma P. v. Pelham Sch. Dist.*, 21 IDELR 104 (D NH 1994).

6. Findings of Fact by a hearing officer made in a regular manner and with evidentiary support are entitled to "presumptive validity, otherwise there would be nothing to overcome." *Doyle v. Arlington County School Bd.*, 953 F.2d 100 (U.S. Ct. of App., 4th Cir. (1991)).

7. Parents of a child with a disability may introduce physician's deposition as evidence without demonstrating circumstances that warrant its use, since strict

rules of evidence do not apply in administrative proceedings. Case No. 12975, IDELR 401:207 (SEA NY 1988).

8. Written psychiatric report was admissible in a due process hearing, despite lack of opportunity to cross examine the individual who prepared it, since the law provides that a hearing officer may admit and consider any evidence that is relevant and possesses probative value. Case No. 85-12, IDELR 507:183 (SEA WA 1985).

9. Since parent left hearing in protest during admission of the district's evidence, her challenge to the authenticity of the school district's documents can not be reviewed on appeal; the district's documents are assumed to be authentic. Case No. 57, IDELR 507:151 (SEA WI 1985).

10. Credibility of witnesses and weight to be accorded their evidence is within the discretion of the hearing officer. Case No. 232, IDELR 506:138 (SEA PA 1984).

D. Expert Witnesses

1. Who is an "expert"?

An expert is an individual qualified to speak authoritatively or give an opinion by reason of his or her training and experience.

The parents failed to meet their burden of proving the need for special education of their child under the IDEA. The student's mother was the only witness at the hearing, and although she could attest to the student's educational success, she was not an expert witness who could offer information as to the existence of a disability, the "educational viability" of assessment procedures and their interpretation, and the appropriateness of the private setting. The ALJ agreed with the district that any difficulties the student was experiencing could be met in the public setting with the offered modifications. Howard County Public School, 25 IDELR 771 (SEA MD 1997).

2. "Battle of the Experts"

Important inquiry - has each expert witness met/worked with the student? Have they visited the present and/or proposed educational placements?

IV. SCOPE OF REVIEW

A. Burden of Proof

1. Definition - Burden of proof is the duty of affirmatively proving a fact in dispute.

2. Determining which party has the burden of proof

a. The school district has the burden of proving at the administrative hearing that it complied with the procedural requirements of the IDEA. *Clyde K. v. Puyallup*, 21 IDELR 664 (U.S. Court of Appeals, 9th Cir. (1994)).

b. The burden of proof rests with the party challenging the student's IEP. *Johnson v. Indep. Sch. Dist.*, 921 F.2d 1022, 17 IDELR 170 (U.S. Court of Appeals, 10th Cir. (1990)). *See also, Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 17 IDELR 990 (U.S. Court of Appeals, 5th Cir. (1991)).

c. "Great deference" must be paid to the educators who develop the IEP. *Todd D. v. Andrews*, 933 F.2d 1576, 17 IDELR 990 (U.S. Court. of Appeals, 11th Cir. (1991)).

d. In a recent SEA decision, a review officer concluded that the hearing officer erred when she placed the burden of proof on the parents. Despite this error, no procedural violation occurred because the hearing officer assigned the district the burden of going forward with the evidence. USD #259, 27 IDELR 117 (SEA KS 1997).

B. Preponderance of the Evidence

Most jurisdictions have adopted the preponderance of the evidence standard for evaluating evidence in due process hearings; that is, evidence which produces the stronger impression and has greater weight on one side than the other (i.e., persuasive evidence). The preponderance standard requires less proof than the standards of clear and convincing proof, or beyond a reasonable doubt, required in criminal proceedings.

C. One-tier vs. Two-tier decision-making process

D. Timelines - 34 CFR 300.512

45-day rule - A final decision shall be mailed no later than 45 days after the receipt of the request for hearing. Exception: continuances may be granted at the request of either party for good cause shown. 34 CFR 300.300.512(c).

The hearing officer concluded that no due process violations occurred during the course of a due process hearing. Although the 45-day rule was not complied with, no harm resulted to the parents or student as a result. The evidence failed to support the remaining alleged due process violations. In re J.D., 26 IDELR 501 (SEA VT 1997).

E. Hearing Record - 34 CFR 300.508(a)(4)

Any party to a hearing has a right to obtain a written or electronic verbatim record of the hearing.

F. Judicial Review - 34 CFR 300.511

An aggrieved party may bring a civil action pursuant to 20 USC 1415(e). In the further appeal to a court of competent jurisdiction, the court will receive the records of the administrative proceeding, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.
Judicial/Administrative Decisions

1. The First Circuit Court rejected the parents' assertion that the district court erred by not giving due deference to the hearing officer's decision. According to the circuit court, the district court properly considered the hearing officer's decision and fully explained the reasons for rejecting the hearing officer's conclusions. *Milford Sch. Dist. v. William F.*, 27 IDELR 23 (1st Cir. 1997).

2. A state appeals court refused to rule on the merits of a claim involving the appropriate placement for a student with impairments in speech, hearing and language, remanding the matter so that deficiencies in the findings of an ALJ could be corrected. The ALJ's "apparent" conclusion -- that the district's instruction was substandard to the student's needs as determined by an outside institution -- necessitated fact-finding as to whether the district was made aware of the diagnosis and plans. The finding of private school reimbursement lacked details in the differences between the private and public institutions, as well as the time period it covered. *Wilson County School System v. Clifton ex rel. Clifton*, 24 IDELR 1157 (Tenn. Ct. App. 1996).

G. Attorneys' Fees - 34 CFR 300.515

1. Currently, hearing officers cannot award attorneys' fees.

2. The court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party. 20 USC 1415 (i)(3)(B).

3. Attorneys' fees are allowable for legal work in connection with due process hearings, since such work is required by the IDEA prior to bringing civil action, but may not be awarded relating to any IEP meeting unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for certain mediations conducted prior to filing a complaint. See also 20 USC 1415(i)(3)(D).

V. PROCEDURAL ERRORS AND REMEDIES

A. "Harmless" vs. "Substantial" error

1. Jurisdictional split

The key inquiry in cases where procedural error has been committed is whether the procedural violation denies the student's right to FAPE. Some jurisdictions adhere to the strict view that if the school district violates any procedural requirement, the district has violated the student's due process rights, and therefore the student and parents are awarded the relief sought at the hearing.

The prevalent view focuses on whether the district's violation is a sufficient flaw to constitute a denial of FAPE. Courts have held that if the "spirit" of the regulation is satisfied and the procedural inadequacies are not fatal, the defects do not necessitate invalidation of the evaluation, the IEP, or the subject being challenged.

2. Common areas where error is committed:

   a. Improper/inadequate notice;

   b. Incomplete IEP/evaluation/classification;

   c. Lack of parent participation in the IEP process;

   d. Lack of qualified participants in the IEP/MDT process;

   e. Admission of incompetent evidence.

C. Remedies

1. The hearing officer has authority to award:

   a. Compensatory education. *Harris v. District of Columbia*, 19 IDELR 105 (D. D.C. 1992); *Murphy v. Timberlane Regional School District*, 18 IDELR 58 (U.S.D.C. NH 1991).

   b. Retroactive reimbursement for educational expenses paid by the parents. OSEP Policy Letter, IDELR 211:429 (1987).

   c. Completion of IEP or new IEP meeting.

2. The hearing officer has NO authority to award:

   a. Punitive damages (i.e., damages for pain and suffering);

   b. Attorneys' fees.

3. Judicial/Administrative Decisions

a. The hearing officer determined an additional procedural violation occurred when the district videotaped a physical therapy session of a special education student without informing her parent, and failed to disclose the tape despite a request for educational records until one of its final witnesses testified regarding it at the due process hearing. As a remedy for this violation, the hearing officer struck the testimony of the district witness who referred to the tape. Cobb County School District, 26 IDELR 229 (SEA GA 1997).

b. It was outside the hearing officer's authority to require a special education student who exhibited inappropriate behaviors to take the prescription Ritalin, as that decision was within the parents' discretion. The hearing officer agreed with the district that the student required counseling as a supplemental service as well as placement in a more restrictive setting such as a self-contained classroom for academic instruction, but did not require the student to take prescription medication as the district requested. Auburn City Board of Education, 25 IDELR 378 (SEA AL 1996).

Section E

SECTION 504-
I.D.E.A. - A.D.A.

The Relationship Between Section 504, the IDEA, the ADA and Regular Education

Presenter:
Art Cernosia, Esq.
Northeast Regional Resource Center
Burlington, Vermont

I. Introduction/Overview

This session will address and analyze the legal requirements of the three major federal laws addressing issues involving individuals with disabilities. Procedural and substantive aspects of the laws will be covered along with discussion regarding practical implementation recommendations for administrators.

II. Statutory Basis - Section 504 of the Rehabilitation Act of 1973

A. No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. (29 U.S.C. § 794)

III. Section 504 Jurisdiction

A. Program or Activity

1. The law defines "program or activity" to include all of the operations of a State Educational Agency (SEA) and Local Educational Agency (LEA) receiving federal funds regardless of whether the specific program or activity involved is a direct recipient of federal funds. (29 U.S.C. § 794(b))

B. *Significant Assistance*

1. *A school district may not directly or through contractual, licensing or other arrangements, aid or perpetuate discrimination against a qualified person with a disability by providing "significant assistance" to an agency, organization or person that discriminates.* ***(34 C.F.R. 104.4(b)(v))***

2. *The following considerations should be examined to determine whether a recipient is providing "significant assistance" to a private group: (1) direct financial support; (2) indirect financial support; (3) provision of tangible resources such as staff and materials; (4) intangible benefits such as the lending of recognition and approval; (5) the selectivity of the recipient's provision of privileges and resources; and (6) whether the relationship is occasional and temporary or permanent and long-term.* *Irvine CA Unified School District,* ***19 IDELR 883 (OCR 1993)***

3. *A school district is in violation of Section 504 when it participates in contractual or other arrangements with private schools which operate programs benefiting from federal financial assistance that are neither accessible nor usable by individuals with disabilities.* *Portsmouth, RI Public Schools,* ***18 IDELR 543 (OCR 1991)***

4. *"Significant assistance" does not necessarily require the transfer of financial resources. It has been found that a district by allowing the use of its facilities, the provision of utilities and maintenance and other intangible benefits (i.e., cooperative efforts, program recognition) provided significant assistance to an agency.* *Fayette County KY School District,* ***(IDELR 353:279 (OCR 1989));*** *Irvine CA Unified School District,* ***19 IDELR 883 (OCR 1993)***

IV. *Definition of a "qualified individual with a disability" under Section 504 and the ADA*

A. *A person with a disability is any person who:*

1. *Has a physical or mental impairment which substantially limits one or more major life activities;*

---

2. *Has a record of such an impairment; or*

3. *Is regarded as having such an impairment. (34 C.F.R. § 104.3(j))*

   NOTE: The second and third prongs of the definition referring to individuals with a "record of" or "regarded as" having an impairment is relevant only when some negative action is taken based on the perception or record. "They cannot be the basis upon which the requirement for a free appropriate public education (FAPE) is triggered." OCR Policy Memorandum, August 3, 1992.

B. *A "qualified" person with a disability for public preschool, elementary, secondary or adult education services is a person with a disability:*

   1. *of an age during which persons without a disability are provided such services;*

   2. *of an age during which it is mandatory under state law to provide such services to persons with disabilities; or*

   3. *to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA). (34 C.F.R. § 104.3(k))*

C. *Physical or Mental Impairment (34 C.F.R. § 104.3(j)(2)(i))*

   1. *Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems; neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular, reproductive, digestive, genito-urinary; hermic and lymphatic; skin; and endocrine; or*

   2. *Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.*

D. *Major Life Activities (34 C.F.R. § 104.3(j)(2)(ii))*

   1. *Functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.*

2. *An individual with disabilities does not include an individual who is currently engaging in the illegal use of drugs when a covered entity acts on the basis of such use.* ***(29 U.S.C. 706(8)(C)(i) amended by the Americans with Disabilities Act)***

3. *Illegal use of drugs means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provision of Federal law.*

V. *Section 504 v. IDEA definitions of persons with disabilities.*

A. *The definition of a qualified person with a disability under Section 504 covers a broader population than the definition of a student with a disability under the IDEA.* ***(2 IDELR 213:144)***

1. *Depending on the severity of their disabling conditions, students who do not meet IDEA eligibility criteria may or may not fit within the definition of Section 504 eligibility. Section 504 eligibility is not automatically bestowed on a student who is referred for a special education evaluation and who is subsequently determined not to be IDEA-eligible.* Letter to Veir, ***20 IDELR 864 (OCR 1993)***

B. *Examples of individuals with disabilities under Section 504* *not covered* *by IDEA.*

1. *Alcohol/Drug Addiction*

   a. *Alcoholism and drug addiction are physical impairments which fall under the coverage of Section 504 but not under IDEA,* IDEA Policy Letter, ***(2 IDELR 213:144, (1988))****, only if the student is currently no longer using drugs.* *(OCR Memorandum,* ***17 IDELR 609 (1991)****). (See* Mazur v. South Burlington School District, ***Civil Action 88-30 (VT 1988)****)*

2. *Communicable Diseases - AIDS, etc.*

    a. Individuals with AIDS, or asymptomatic carriers of the AIDS virus (HIV) are considered "persons with disabilities" under Section 504. Thomas v. Atascadero Unified School Dist. et al., (1987-88 IDELR 559:113 (C.D. CA 1987)); District No. 27 Community School v. The Board of Education of the City of New York, (1985-86 IDELR 557:241 (Sup. Ct. NY 1986)).

    b. Hepatitis B carrier is a person with a disability. Clare-Gladwin Inter. School District, 16 IDELR 105 (OCR 1989).

3. Injured students - broken leg, etc.

    a. Students with physical disabilities such as those who use crutches are disabled under Section 504 even though they are not part of the district's special education program. School District of Pittsburgh, PA, (IDELR 257:492 (OCR 1984)).

    b. Homebound student, temporarily disabled as a result of an automobile accident, is person with a disability under Section 504. Lee's Summit, MO, R-VIII School District, IDELR 257:629 (OCR 1984).

4. Students with severe allergies or chronic asthma (See Berlin Brothers Valley School District, (IDELR 353:124 (OCR 1988)); Middlebury Community Schools, IDELR 257:593 (OCR 1984)).

5. Students with environmental illness. Montpelier VT Public Schools, 18 IDELR 1054 (OCR 1992). Student allergic to fumes from new carpeting. See also Simmons College, Complaint 01-90-2041 (OCR 1990).

6. Students who are 22 or older depending on state law. Williamson County School District, IDELR 352:514 (OCR 1988)

7. Attention Deficit Hyperactive Disorder Fairfield-Suisun Unified School District, IDELR 353:205 (OCR 1989); ADD diagnosis but no substantial limitation on learning Jefferson Parish Public Schools, 16 IDELR 755 (OCR 1990). However, if child with ADD is determined to be in need of special education, such child is eligible under the IDEA as a child with a "health impairment." See Joint

Policy Memorandum from OSEP/OCR, ***18 IDELR 116 (OSERS 1991).***

8. *Socially Maladjusted Irvine Unified School District,* ***IDELR 353:192 (OCR 1989).***

9. *Parents who have a disabling condition Rothschild v. Grottenthaler,* ***907 F.2d. 286 (U.S. Court of Appeals, 2nd Circuit (1990).***

10. *Employees*

11. *Post-Secondary Institutions*

VI. Policy/Procedural Requirements Under Section 504 for State and Local Educational Agencies.

A. *Non-Discrimination Assurance* ***(34 C.F.R. § 104.5).***

B. *Notice to Students, Parents, Employees, Union, Professional Organizations regarding Non-Discrimination Policy* ***(34 C.F.R. § 104.8 and § 104.32(b))*** *(See sample notice attached.)*

  1. ***Public elementary and secondary schools shall annually take "appropriate steps" to notify persons with disabilities and their parents/guardians of the school's responsibilities to students under*** *Section 504.* ***(34 C.F.R. § 104.32(b))***

C. *Designation/Notice of Section 504 Coordinator* ***(34 C.F.R. § 104.7(a))***

D. *Adoption of Section 504 Grievance Procedure* ***(34 C.F.R. § 104.7(b))***

E. *Child Find and Referral Procedures for Section 504 eligible individuals* ***(34 C.F.R. § 104.32(a))***

  1. *A school district's policy of evaluating only those students who fall within IDEA categories does not necessarily satisfy the mandate under Section 504 who needs or is believed to need special education or related services. Linden, CA Unified School District,* ***(IDELR 352:617 (OCR 1988));*** *Mesa, AZ Unified School District No. 4,* ***(IDELR 312:103)(OCR 1988))***

2. *Pre-referral Process*

   a. *A school district was found to be in violation of Section 504 because it systematically failed to inform parents of their procedural safeguards during the pre-referral process. Parents were provided a written notice of their rights after a child study team determined that an evaluation was warranted. Curwensville Area (PA) School District, IDELR 353:292 (OCR 1989). See also Philadelphia School District, 18 IDELR 931 (OCR 1992).*

   b. *The role of Site Consultation Teams used to identify students having problems and recommend appropriate course of action constituted an "evaluation" under Section 504 requiring full procedural safeguards. San Diego City School District, IDELR 353:236 (OCR 1989).*

F. *Standards and Procedures for Section 504 Evaluations (34 C.F.R. §104.35(a),(b) and (d))*

   1. *Section 504 does not define the term "evaluation." The Regulations do require that public elementary and secondary schools "establish standards and procedures" for the evaluation and placement of persons, who because of disability, need or are believed to need special education or related services before taking any action with respect to initial placement in a regular or special education program and any subsequent significant change in placement. (34 C.F.R. § 104.35(a) and (b))*

2. The evaluation procedures established shall ensure:

   a. tests and other evaluation materials have been validated

   b. evaluations are administered by trained personnel

   c. evaluations are tailored to assess specific areas of educational need

   d. tests are selected and administered that accurately reflect the factors the test purports to measure. 34 C.F.R. § 104.35(b)(1)-(3))

3. Although Section 504 regulations do not contain timelines for evaluation, the OCR interprets the regulations as requiring the evaluation be completed "within a reasonable period of time." In the absence of local procedures, the OCR will refer to applicable state special education rules as a measure of reasonable timeframes. Vigo County (IN) School Corporation, 18 IDELR 473 (OCR 1991).

G. Standards and Procedures for Section 504 Placements (34 C.F.R. § 104.35(c))

1. Procedurally, schools in interpreting evaluation data shall:

   a. draw upon information from a variety of sources (tests, teacher recommendations, physical condition, social or cultural background, adaptive behavior)

   b. establish procedures to document that the evaluation information has been considered

   c. ensure that individuals who are knowledgeable about the meaning of the evaluation data are involved in the team making placement decisions. (34 C.F.R. § 104.35(c))

2. Section 504 requires that students with disabilities receive services in the Least Restrictive Environment. The LRE provision of Section 504 will be construed to be consistent with such provision under the IDEA. Oberti v. Clementon School District, Civil Action #91-2818 (D. NJ August 17, 1992). On Appeal, the Court refused the Section

504 claim.

3. *In order to legally segregate a child with AIDS from other children in a classroom, a Court must find more than a "remote theoretical possibility" of transmission of the virus; it must find that with the use of reasonable accommodations, there is a "significant risk of transmission."* Martinez v. School Board of Hillsborough County, Florida, ***441:257 IDELR (U.S. Court of Appeals, 11th Circuit (1988))***

H. *System of Procedural Safeguards* ***(34 C.F.R. § 104.36).***

1. *Notice*

   a. *Parents must have notice of actions regarding the identification, evaluation and placement of their children. The notice does not legally need to be in writing.* OCR Memorandum to OCR Senior Staff, *October 24, 1988.* ***NOTE:*** *It would be considered essential best practice to have documentation of such notice.*

2. *Opportunity to examine relevant records*

3. *Impartial Hearing*

   a. *If a state does not permit IDEA Hearing Officers from ruling on Section 504 issues, then school districts must offer alternative hearing procedures. Section 504 regulations do not specify timelines or impartiality requirements, therefore OCR applies a standard of fundamental fairness and will be guided by IDEA case law and other decisions.* OCR Policy Letter, ***18 IDELR 230 (OCR 1991).***

4. *Review Procedure*

5. *Compliance with the procedural safeguards under IDEA is one means of meeting this requirement*

VII. *Free Appropriate Public Education (FAPE) under Section 504*

A. *Free Appropriate Public Education is the provision of regular or special education* ***and related aids and services that are designed to meet individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met and are based upon adherence to procedural requirements. (34 C.F.R. § 104.33(b)(1))*** *(emphasis added)*

1. ***The Office for Civil Rights reaffirmed that the Section 504 provision providing for a FAPE requires school districts to meet the individual needs of all students to the same extent, though not necessarily by providing the same programs and services to students with and without disabilities. The OCR's policy letter rejected the notion that the school's obligation is limited to providing "reasonable accommodations."*** *OCR Letter to Zirkel, (August 23, 1993).*

2. ***The implementation of an IEP under the IDEA is one means of providing a free appropriate public education. (34 C.F.R. § 104.33(b)(2)).***

B. *Least Restrictive Environment*

1. *Academic setting.* ***A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified disabled person in its jurisdiction with persons who are not disabled to the maximum, extent appropriate to the needs of the disabled person. A recipient shall place a disabled person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.***

2. *Nonacademic settings. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in Reg.* ***104.37(a)(2)****, a recipient shall ensure that disabled*

persons participate with non-disabled persons in such activities and services to the maximum extent appropriate to the needs of the disabled person in question. ***34 C.F.R. 104.34***

C. *Discipline*

1. *For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any student with a disability who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against students without disabilities. Furthermore, the due process procedures at* ***34 C.F.R. 104.36*** *shall not apply to such disciplinary actions.* ***29 U.S.C. 706(8)(a)(c)(iv)*** *amended by the Americans with Disabilities Act of 1990. See also OCR Memo,* ***17 IDELR 609 (1991).***

2. *If it is determined that the misconduct is not a manifestation of the child's disability, the child may be excluded from school in the same manner as children who are not disabled. In such a situation, all educational services to the child may cease. (See OCR Memo,* ***IDELR 307:05****) But see IDEA Policy Letter,* ***IDELR 213:258 (1989).***

3. *In-school suspensions are governed by the same procedures and time limitations applicable to other suspensions. OCR Letters,* ***IDELR 305:26 and 305:28 (OCR 1986))***

D. *Behavior Management*

1. *Student with Rett's Syndrome who exhibited uncontrollable biting and spitting was required to wear shielding device. OCR held the District's decision was not a violation of Section 504. LaCrosse WI Public School District,* ***19 IDELR 189 (OCR 1992).***
2. *Physical restraints used by teachers and aides to prevent student from harming himself or others was permissible despite ban on use of corporal punishment. Florence County South Carolina School District,* ***IDELR 352:495 (OCR 1987).***

3. Student who was disabled and removed from his classroom due to misbehavior on four occasions for approximately ten minutes each was not denied a free, appropriate public education. Such temporary removal from the classroom did not constitute a significant change of educational placement. Edcouch-Elsa Texas Independent School District, **IDELR 352:393 (OCR 1987).**

E. Non-academic/Extracurricular services

1. Students with disabilities shall be afforded an equal opportunity to participate in such services and activities. **(34 C.F.R. § 104.37).**

2. Services and activities include counseling, physical recreational athletics, transportation, health services, special interest groups or clubs and student employment. OCR Policy Interpretation No. 5. **(1 IDELR 132:03).**

3. A school district was found to be in violation of Section 504 by failing to adequately and effectively inform students with disabilities of college board examination special provisions. Cambridge MA Public Schools, **17 IDELR 996 (OCR) 1991).**

4. A 19-year-old student with a learning disability who was not allowed to participate in interscholastic athletics because of his age was entitled to injunctive relief on claims that this action violated his rights under the ADA, Section 504, and Section 1983. Pottgen v. Missouri State High School Activities Association, **21 IDELR 33 (ED Michigan (1994)).**

F. Services and/or Accommodations under Section 504

1. Student with a learning disability is entitled to individual consideration in determining whether a reader should be assigned to administer graduation examination. Hawaii Department of Education, **17 IDELR 360 (OCR 1990).**

2. Student with temporary disability entitled to homebound instruction

beyond District's policy limiting homebound instruction to 5 hours per week. Decision must be based on individual circumstances. *Lee's Summit R-VII School District,* ***IDELR 257:629 (OCR 1984).*** *See also Greensville County School Board,* ***IDELR 353:118 (OCR 1988).***

3. *Modification in grading system required. Harrison County School District,* ***IDELR 353:120 (OCR 1988).***

4. *Administration of medication. Berlin Brothers Valley School District,* ***IDELR 353:124 (OCR 1988).*** *A school district must take steps to monitor a student's medication (Ritalin) and ensure that the student receives his medication as prescribed. Since administration of medication is a related service under Section 504 if it is necessary to enable a student to benefit from the education program, the district has the ultimate obligation to see that it is provided. San Ramon Valley CA Unified School District,* ***18 IDELR 465 (OCR 1991).***

5. *Modification of minimum attendance policy for students who are absent due to disability. Lowell Area School District,* ***IDELR 352:574 (OCR 1987).***

6. *Honor Roll eligibility standards must address student with disabilities. Fordland R-III School District,* ***IDELR 353:127 (OCR 1988).***

7. *The parents of a student with a disability sought reimbursement for private therapy, a private evaluation, private school tuition and compensatory education. The Reviewing Officer held although reimbursement is available under Section 504, the school was not required to reimburse the parents except for the evaluation. Due to the district's failure to provide adequate accommodations to the student in her chemistry class, the district was ordered to reimburse the parents for one-half the cost of a post-secondary remedial chemistry course. Case No. 272,* ***18 IDELR 374 (VT 1991).***

8. *OCR determined that the District acted reasonably by temporarily removing a student with nephritic syndrome and allergies to new*

BEST COPY AVAILABLE

carpeting from the classroom and offering the option of returning the student to the classroom or placing him at a different school. *Montpelier VT Public Schools,* ***18 IDELR 1054 (OCR 1992).***

VIII. Qualified Employees with Disabilities

A. No qualified person with a disability shall, on the basis of the disability, be subject to discrimination in employment. The employer shall make "reasonable accommodations" to known physical or mental limitations of an otherwise qualified disabled applicant/employee unless it can be demonstrated that the accommodation would impose an undue hardship on the operation of its program.

1. A special education teacher who was not able to successfully complete the communication skills portion of the National Teacher Examination was not "otherwise qualified" under Section 504 because she could not perform essential job functions. *Pandazides v. Virginia Board of Education,* ***19 IDELR 268 (E.D. VA 1992).***

The Court of Appeals has now determined that the teacher is entitled to a jury trial on her Section 504 claim. The case has been remanded for a jury trial. *Pandazides v. Virginia Board of Education,* ***21 IDELR 273 (U.S. Court of Appeals, 4th Circuit (1994)).***

B. An SEA or LEA which receives IDEA funds shall take positive steps to employ and advance employees who are qualified persons with disabilities in IDEA assisted programs. ***(34 C.F.R. § 104.11(a)(2)).***

C. Reasonable Accommodation Considerations

1. *overall size/type of program*
2. *number and type of facility*
3. *size of budget*
4. *composition/structure of workforce*
5. *nature and cost of necessary accommodation*

D. Pre-employment Inquiries

E. Employment Criteria

IX. Enforcement of Section 504

A. Local Grievance ***(34 C.F.R. § 104.7(b)).***

1. applies to school systems employing 15 or more employees
2. "appropriate due process standards"
3. prompt and equitable resolution of complaints

NOTE: Unlike the IDEA, state education agencies are not required to establish state complaint systems to handle complaints alleging that school districts are not complying with Section 504 requirements.

B. Impartial Hearing ***(34 C.F.R. § 104.36).***

1. If a state does not permit IDEA Hearing Officers from ruling on Section 504 issues, then school districts must offer alternative hearing procedures. Section 504 regulations do not specify timelines or impartiality requirements, therefore OCR applies a standard of fundamental fairness and will be guided by IDEA case law and other decisions. OCR Policy Letter, ***18 IDELR 230 (OCR 1991).***

C. Office for Civil Rights (OCR) Complaints

1. OCR Investigation Procedures

a. Complaints mean written statements alleging facts which, if true, would constitute a violation of Section 504. This does not include inquiries received by OCR that only solicit OCR's interpretation of the law or OCR's policies. Revised Memorandum of Understanding Between the Office for Civil Rights and the Office of Special Education and Rehabilitative Services, August 1987.

b. Complaints may address individual student and/or systemic/class issues.

c. *Time Limits - The complaint must be made within 180 days of the alleged discriminatory act.* **NOTE:** *The Regional Director has the authority to waive 180 day limit. See* Kendall County Special Education Cooperative, **16 IDELR 1318 (OCT 1990).**

d. *Early Complaint Resolution (ECR) available in individual not class complaints.*

e. *The Office for Civil Rights Regulations, Appendix A, contain a comment that "it is not the intention of the Department except in extraordinary circumstances to review the result of individual placement and other educational decisions so long as the school district complies with the process requirements of this subpart concerning identification and location, evaluation and due process procedures. However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education."* (**Federal Register, Vol. 42 No. 86, page 22690 (May 4, 1977)**) *See also* Richland County SC School District, **18 IDELR 974 (OCR 1991).**

f. *OCR Complaint Resolution Manual (Nov. 30, 1993)*

2. *Remedies*

a. *Despite parents' requests for testing and counseling for their child, his difficulties with written work and his attention span, and failing grades, a board did not evaluate the student to determine if he had a disability and required special education services. Thus, OCR held the parents were entitled to reimbursement for an independent educational evaluation which detected the student's attention deficit disorder (ADD) and his placement at a private school for students with learning disabilities.* Livingston Parish (LA) School Board, **20 IDELR 1470 (OCT 1993).**

D. *Judicial Actions*

1. *Exhaustion Requirements*

   a. *The Handicapped Children's Protection Act of 1986 reaffirmed the viability of Section 504 as a separate vehicle for ensuring the rights of children with disabilities. If one is seeking relief under Section 504 that is also available under the IDEA, then IDEA exhaustion requirements apply. Mrs. W., et al. v. Tirozzi, et al., (1987-88 IDELR DEC. 559:184 (U.S. Court of Appeals, 2nd Cir. 1987))*

2. *Section 504 has no built-in Statue of Limitations. Therefore, the Court will apply the most closely analogous statute of limitations of the state in which the claim arose. Hall v. Knott County Board of Education, 18 IDELR 192 (U.S. Court of Appeals, 6th Circuit (1991))*

3. *Attorney's Fees*

   a. *The Court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. (29 U.S.C. § 794(a)(2)(b)).*

4. *Damages/Remedies*

   a. *The United States Supreme Court held that educational entities may be held liable under Title IX for the sexual harassment of a student by a teacher. The Court held that punitive and compensatory money damages are available to a plaintiff who alleges intentional discrimination and that there is no statutory cap on those damages.*

      Since Section 504 wording parallels Title IX, this case has great significance for Section 504 remedies. Franklin v. Gwinnet County Public Schools, 112 S. Ct. 1028 (1992).

   b. *The parents of a student with a learning disability have been allowed to pursue a monetary damage claim under Section 504 for failure to assess and properly identify their son's* *special education needs.* *John and Kathryn G. v. Board of Education of Mt. Vernon Public Schools,* *18 IDELR 1026 (SD NY (1992)).*

c. *The parent of a student with a learning disability was not entitled to monetary relief in a civil action against a school district for its alleged failure to properly evaluate and place the student. These claims involved educational malpractice and could not be entertained or redressed by a court of law.* *Brantley v. District of Columbia,* *21 IDELR 182 (D.D.C. 1994)*

5. *Neither Part B nor Section 504 contains any language holding individuals personally responsible for the civil rights violations perpetuated in the course of their employment. However, if administrative personnel refuse to implement policies necessary for compliance with Section 504, their employer, usually an LEA or SEA, is liable for any resulting civil rights violation as long as the employer is under the jurisdiction of OCR.* *Letter to Williams,* *21 IDELR 73 (OSEP 1994).*

E. *Harassment/Retaliation of Complainant*

X. *Miscellaneous Issues under Section 504*

A. *Program Accessibility*

1. *Each program or activity, when viewed in its entirety, must be readily accessible to persons with disabilities. (34 C.F.R. § 104.22(a)).*

a. *A playground on school district premises, constructed by private funds, was not accessible to students who use wheelchairs in violation of Section 504 (34 C.F.R. 104.23 and 104.37(a)).* *Hazelton (PA) Area School District,* *17 IDELR 907 (OCR 1991).*

2. *Methods for providing accessible programs*

a. *redesign of equipment*

b. *reassignment of class or other services to accessible sites*

c. *assignment of aides*

d. *alteration of existing facilities*

e. ***carrying the student is an unacceptable method of providing program accessibility.** OCR Policy Interpretation No. 4, **(1 IDELR 132:02 (OCR 1978)).***

3. *New construction*

    a. *Uniform Federal Accessibility Standards (UFAS) - effective 1/18/91.*

    b. *Americans with Disabilities Act Accessibility Guidelines (ADAAG).*

4. *Existing Facilities (prior to January 18, 1991).*

    a. *American National Standards Institute (ANSI).*

B. *Private School Programs*

1. ***If receiving federal funds, the private school may not, on the basis of the disability, exclude a qualified person with a disability if the person can, with minor adjustments, be provided an appropriate education. (34 C.F.R. § 104.39);** see also, St. Peter's Development Center, **(IDELR 352:479 (OCR 1987))***

XI. ***Americans with Disabilities Act (ADA)***

A. *It is the purpose of this Act to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. **(42 U.S.C. Section 12101(b)(1)).***

B. *The ADA covers:*

1. *Employment (Title I)*

2. *Public Services (Title II)*

    a. *The ADA, Title II which applies to local government agencies (i.e., school districts) is construed to prohibit conduct that constitutes a violation of Section 504. Accordingly, OCR translates Section 504 Regulations which apply to pre-school, elementary and secondary education into issues under the general non-discrimination provisions of the ADA, Title II. OCR Letter, March 13, 1992. In effect virtually every Section 504 violation is also construed as an ADA violation.*

3. *Public Accommodations and Services Operated by Private Entities (Title III)*

    a. *includes daycare centers, nursery, elementary, secondary, undergraduate or post-graduate private schools or other places of education.*

4. *Telecommunications (Title IV)*

    a. *Where a public entity communicates by telephone, TDDs or equally effective telecommunications systems shall be used.*

C. *Administrative Requirements*

1. *Transition Plan*

    a. *A public entity with 50 or more employees shall develop a written plan setting forth steps necessary to undertake structural changes necessary to achieve program accessibility.*

        (1) *Due date - July 1992 Self-Evaluation*

    b. *A public entity shall by January 26, 1993, evaluate its current:*

        - *services*
        - *policies*
        - *practices*

- effects thereof

and proceed to make necessary modifications.

c. Opportunity to participate shall be provided to individuals with disabilities or organizations representing individuals with disabilities.

d. Self-Evaluation must be kept on file for at least 3 years and open for public inspection (for public entities that employ 50 or more persons).

e. If a Section 504 Self-Evaluation was completed, then the ADA evaluation requirements apply only to those policies and practices not included in the Section 504 Evaluation. **(28 C.F.R. 35.105).**

2. Notice

Applicants, employees, and other interested persons must be notified in an accessible form regarding applicable provisions of the ADA. **(28 C.F.R. 35.106).**

3. Designation of Responsible Employee

If a public employer employs 50 or more persons, it shall designate at least one employee to coordinate compliance efforts. The name, office address and telephone number of the employee so designated shall be made available to all interested individuals. **(28 C.F.R. 35.107(a)).**

4. Complaint Procedure

A public entity with 50 or more employees shall adopt and publish grievance procedures providing for prompt and equitable resolutions of complaints. **(28 C.F.R. 35.107(b))**

5. Effective Dates

a. Title I - Employment

- *Employers with 25 or more employees - July 26, 1992*
- *Employers with 15 or more employees - July 26, 1994*

b. *Title II - State and Local Government Services*

- *January 26, 1992*

XII. Conclusions/Questions/Comments

h:\user\jan\art\the-504\9.21.94

Section F

GUIDELINES FOR CONDUCTING A DUE PROCESS HEARING

Overview

The Individuals with Disabilities Education Act (IDEA) requires that states provide as part of its State Plan a due process hearing system to address disputes between a parent and the local education agency. A parent or local education agency may request a due process hearing regarding the identification, evaluation, the educational placement or the provision of a free appropriate public education of a student with a disability. (See IDEA Reg. 34 CFR§300.506)

Arizona has chosen to have a two-tiered administrative hearing system. The initial hearing request will be assigned to a Due Process Hearing Officer who conducts the hearing and renders a written decision within 45 calendar days of the original hearing request. (34CFR§300.506) A party receiving an adverse decision may initiate an administrative appeal to a State Review Officer who issues an independent decision within 30 days of the appeal request. (34 CFR§300.510)

Any party aggrieved by the State Reviewing Officer's decision may initiate an appeal to state or federal court.

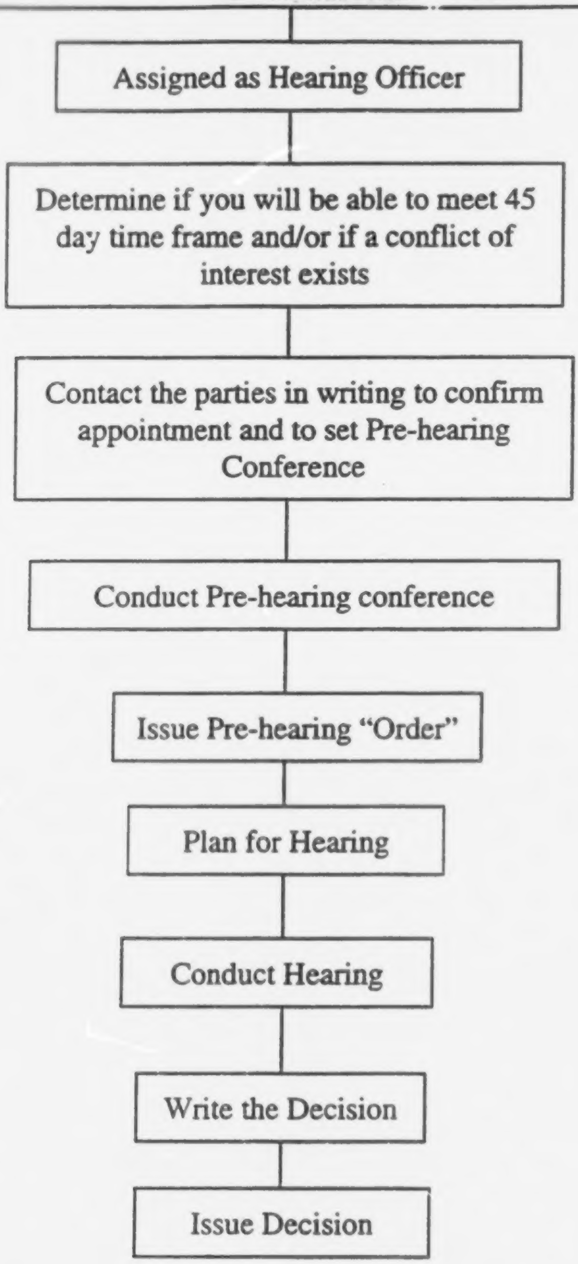
IDEA Due Process System

State/Federal Court
↑
State Level Administrative Appeal
↑
Local Impartial Due Process Hearing

These guidelines are intended to be a resource especially for Due Process Hearing officers who are appointed to conduct the initial administrative hearing on the disputed issues.

The following flowchart illustrates the procedures from assignment to the issuance of a decision. The guidelines will discuss each of these procedural stops.

FLOW CHART OF DUE PROCESS HEARING PROCEDURES


Assigned as Hearing Officer
Determine if you will be able to meet 45 day time frame and/or if a conflict of interest exists
Contact the parties in writing to confirm appointment and to set Pre-hearing Conference
Conduct Pre-hearing conference
Issue Pre-hearing "Order"
Plan for Hearing
Conduct Hearing
Write the Decision
Issue Decision

ASSIGNMENT OF HEARING OFFICER

When a hearing request is received, a list of three hearing officers will be sent to each party. The hearing officer names on the list will be selected on a rotational basis from those individuals who have successfully completed the training. The parties will then select a hearing officer from the list. If you are selected to be the Due Process Hearing Officer, you will receive written notification from the Department.

When you are assigned as the Hearing Officer in a case, you will want to make sure that you have the following information as a result of this contact:

1. A copy of the written request for the hearing. Be sure to note the date of the request -- you will have only 45 calendar days following this date to complete the hearing and issue a decision unless a specific extension of time has been granted by you;
2. The name and phone number for each party;
3. The name and phone number of each party's advocate or attorney, if applicable.

When accepting assignment as a hearing officer in a case, you need to verify that your schedule allows you to complete the hearing and issue a written decision within 45 calendar days of the date the request was received by the district. In addition, it is of utmost importance that you review the request to ensure that you can carry out your responsibilities in an impartial manner and have no conflict of interest.

Arizona guidelines define the term *impartial hearing officer* to mean a person or tribunal of persons assigned to preside at a due process hearing whose duty it is to assure that proper procedures are followed and that rights of the parties are protected. In all cases, any action taken must comply with current ARS §§ 15-766 and 15-767 and federal court decisions. An impartial hearing officer shall be:

BEST COPY AVAILABLE

1. Unbiased--not prejudiced for or against any party in the hearing;
2. Disinterested--not having any personal or professional interest which would conflict with his/her objectivity in the hearing;
3. Independent--may not be an officer, employee, or agent of the LEA or SSI involved in the education or care of the child. A person who otherwise qualifies to conduct a hearing is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer;
4. Trained by the agency as to the state and federal laws pertaining to the evaluation, placement, and education of children with disabilities.

Should you determine that based on your personal and/or professional relationships, that you have a conflict of interest and cannot be impartial, you have an obligation to recuse yourself, that is, remove yourself from the case.

In the event that you have what might appear to be a conflict of interest which you determine will not interfere with your ability to remain impartial, it is strongly suggested that you disclose such facts to the parties on the record. By doing so you afford both parties the opportunity to ask clarifying questions and ultimately give them the right to challenge your impartiality.

PRE-HEARING CONFERENCES

One of your main responsibilities as a hearing officer is to maintain control over the hearing process and see that it operates in an efficient and effective manner. Therefore, it is strongly recommended that a pre-hearing conference be held with the parties and/or their representatives as appropriate. As soon as you are assigned as a hearing officer, send a notice to the parties *(or their representatives)* of your assignment along with the date and time and purpose of the pre-hearing conference. *(Note: If distance is a problem, the pre-hearing can be held through a teleconference.)* See sample letter to parties at the end of this section.

The purpose of the pre-hearing conference is to clarify procedural matters and to specify the issues that will be heard. The hearing officer should not offer advice to either party. The pre-hearing conference must be held in the presence of the parties/representatives concerned. Discussion with either party separately could result in an exparte (of one part; on one side) relationship which would taint the impartiality of the process.

In conducting a pre-hearing conference, you may want to have a verbatim recording of the proceedings. In the absence of a verbatim recording, the hearing officer should keep extensive, complete, and accurate notes in order to provide a record and to avoid any misunderstandings.

Immediately after the pre-hearing conference, the hearig officer should make the conference a matter of record by writing all parties concerned. The written record should contain: (1) a specific statement of the issues to be resolved at the hearing, (2) the time, place, and other physical arrangements for the hearing, and (3) clarification on any procedural points that may have been disclosed. ***(See sample pre-hearing letter at the end of this section.)***

The following summary identifies the potential items which can be covered in a pre-hearing conference.

PRE-HEARING CONFERENCE CHECKLIST

1. If party*(ies)* are unrepresented, clarify their intent to proceed with or without representation.

   The IDEA gives both the parent and the local education agency the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities. You want to ensure that the local education agency has carried out its legal requirement of informing the parent of any free or low cost legal or other relevant services available. (See 34CFR§300.506(b)).

BEST COPY AVAILABLE

2. Set expectations for the parties and their representatives for their conduct throughout the proceedings.

   Special education hearings oftentimes become very emotional and can be adversarial. It is extremely important for the Hearing Officer to clearly set out the expectations of conduct for the parties. Parties/representatives should be warned that rude or discourteous behavior will not be tolerated.

3. Encourage parties to explore mediation or other settlement options.

   Mediation is an available option for parties to resolve their differences. It must be voluntary and cannot be used to delay/deny the right to go to a hearing. Hearing Officers should raise the mediation option and encourage parties to pursue mediation if they have not already done so. Hearing Officers, however, should not turn the pre-hearing conference into a mediation session.

4. Clarify the issue(s) identified by the moving party and the relief they are seeking through the hearing process.

   It is critical that the Hearing Officer and both parties have a clear understanding of the specific issues(s) and the relief sought from the hearing process.

5. Confirm your jurisdiction to hear the issues and grant the relief sought.

   Based on the issue(s) identified and the relief sought, you may question whether you have the legal jurisdiction to hear the case. Not every concern a party has automatically becomes a special education hearing issue under the IDEA. Should you question your jurisdiction over a particular issue, raise your concern with both parties and give them an opportunity to provide you with legal authority to support/negate your jurisdiction. Should you conclude you have no jurisdiction, you have the authority to dismiss the matter.

6. Review the procedural safeguards applicable to the hearing process.

   a. Do the parents want the hearing open or closed?

   b. Do the parents choose to have their child present at the hearing?

The IDEA specifically gives the parents the sole right to decide whether the hearing will be open or closed to the public and whether the child who is the subject of the hearing will be present at the hearing.

If the hearing will be closed, you must decide who in addition to the attorney/advocate will be allowed to remain in the hearing. Typically, the parent and a school district representative are allowed to remain in the hearing room.

7. Review the Hearing Procedures

   a. Estimate the number of days each party will need to present their case.

   b. Set the hearing date(s), time and place.

   c. Review the method of recording the hearing.

The local education agency is responsible for arranging for the hearing room and recording the hearing. The IDEA regulations require that there be a written or electronic verbatim record of the hearing which will be made available to the parties. Therefore, either a court reporter or tape recording device must be arranged for. If a tape recorder will be used, external microphones should be provided in order that the witness', hearing officer's and party's statements will be clearly audible.

8. Review Evidentiary Issues

   a. Identify the last day for exchange of exhibits and list of witnesses to comply with the "5 Day Rule."

The IDEA regulations gives either party to the hearing the right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing. (34 CFR§300.508(a)(13)). This is commonly referred to as the "5 Day Rule."

The 5 Day Rule requires that any documents to be introduced as exhibits at the hearing and names of witnesses to be called and the summary of their testimony be disclosed to the other party. It is recommended that the Hearing Officer also receive the proposed exhibits and witness lists at this time.

   b. Consider ordering the parties to submit a list of joint exhibits.

In order to facilitate the introduction of exhibits, consider ordering the parties (especially if both are represented) to meet and submit joint exhibits. This can serve two purposes: (1) since many, if not most, of the documents will be submitted by both parties (i.e., IEPs, evaluation reports) it is much easier to refer to the same document in the same manner. Example, the latest IEP will be Joint Exhibit #5 instead of Parents Exhibit #7 and District Exhibit D. Secondly, it requires the *parties to sit down and work with one another which at times has lead to resolution of the issues. The parties may also stipulate to the admission of the joint exhibits which leads to a more efficient hearing.*

c. Discuss the "burden of proof."

The "burden of proof" issue is not discussed in the IDEA. Judicial interpretation of this issue from the Ninth Circuit Court of Appeals, which is binding in Arizona, states, "The School Clearly has the burden of proving at the administrative hearing that it complied with the IDEA." *Clyde K. v Pugallup School District, 35 F3d 1396 (9th Circuit 1994)*

d. Discuss the fact that the Rules of Evidence will not be strictly applied, although there is an expectation to avoid redundant and irrelevant testimony.

e. Address any request to compel the attendance of witnesses.

Either party has the right to compel the attendance of witnesses. (34 CFR Section 300.507 (a)(2)).

Although the federal regulations give the hearing officer the authority to compel the attendance of witnesses, the Hearing Officer does not have the authority to enforce the subpoena of witnesses. However, the legal counsel for the party exercising this right may go through the courts to enforce the subpoena of a witness.

9. Other Motions/Requests

A. Extension of the 45 Day Time Frame

The IDEA regulations (34 C.F.R. Section 300.512) require that the Hearing Officer assigned to a case issue a written hearing decision and send it to the parties within 45 calendar days of receipt of the hearing request. Please note that the 45 day time frame begins on the date the local Education Agency or State Supported Institution receives the written request, not the date that you, the Hearing Officer, are assigned to the case.

The regulations do permit the Hearing Officer to extend the 45 day time line. The Hearing Officer may grant specific extension of time at the request of either or both parties. The regulations do not permit the Hearing Officer to extend the 45 day time frame on his/her own initiative.

Since the Arizona Department of Education is given the legal responsibility to ensure that this requirement is adhered to, the Hearing Officer is required to complete a Time line Extension Form (see the enclosed form at the end of this section) *to be sent to both parties, as well as the Special Education Section of the Department of Education.*

B. Motion to Dismiss

Hearing Officers are authorized to determine whether the issues raised are within the jurisdiction of an IDEA hearing (OSEP Policy letter, October 1990). If a party files a Motion to Dismiss, a hearing officer after giving both parties the opportunity for oral/written argument may dismiss the proceeding based on lack of jurisdiction.

C. Motion for Recusal

Although these guidelines have previously addressed the potential need for a Hearing Officer to recuse themselves based on a conflict of interest, a party may move for recusal. Although the IDEA does not describe the applicable standard in such a situation, courts have found the standard is analogous to one involving the disqualification of federal judges. Only if a decision to sit "cannot be defended as a rational conclusion supported by a reasonable reading of the record" will the court insist upon disqualification. Manchester School District v Christopher B, 19 IDELR 143 (D.N.H. 1992).

D. Clarification of "stay put"

The student who is the subject of the hearing must remain in his/her present educational placement during the pendency of the hearing process unless the school district and parents agree otherwise. (34 CFR Section 300.513). This is known as the "stay put" rule.

E. Access to Records

Parents are given the right to inspect and review the education records of their child prior to the hearing. (34 CFR Section 300.562(a)).

BEST COPY AVAILABLE

THE HEARING

In order to ensure that the hearing will proceed smoothly, according to the agenda, and follow the hearing procedures which you have developed prior to the hearing date, you will want to:

1. Ensure that the School District has made arrangements for providing a written and/or electronic verbatim record of the hearing.

2. The hearing room has been confirmed by the District. The hearing room should be physically accessible and in a quiet and private space. Have the room arranged so that there is a separate witness chair close to the recorder and you. Two tables with chairs need to be set up for the parties and their representatives.

3. Determine if any individual who will participate in the hearing is in need of an accommodation such as an interpreter.

4. Develop an outline of your opening and closing statements including:

OPENING STATEMENT *(Example included in this section)*

a. Identification of the hearing for the record;

b. An overview of what a hearing is; and

c. Review of hearing procedures (*e.g., rules for presenting evidence, witnesses, etc.)*

CLOSING STATEMENT

a. Summary of the hearing process which has taken place

b. Outline what will happen next

  - Both sides will receive a written report of the facts and findings of the hearing including the decision of the Hearing Officer within 45 days from the date the hearing was requested unless an extension was granted
  - A request to submit post-hearing memorandums with dates for submission

4. Be prepared to take notes during the hearing, for your own use, even though a court reporter may be present.

   - Have a sheet ready to list evidence
   - Have a sheet ready to list witnesses.

5. Review the proposed exhibits and list of witnesses shared in response to the "Five Day Rule."

6. Have a copy of the affirmation oath that will be used to swear in witnesses.

Example:

Please stand, raise your right hand: "In the testimony you are about to give, do you affirm that you will tell the whole truth and nothing but the truth?"

INTRODUCTORY REMARKS

THE DUE PROCESS HEARING OFFICER BEGINS THE HEARING BY:

1. Formally calling the hearing to order at the appointed time.

2. Identify the hearing for the record or transcript; make a formal statement that: "The Impartial Due Process hearing on behalf of *(student's legal name)* is now convened on *(date)* at *(time)*. The impartial hearing officer presiding is *(legal name of DPHO)*. The parent(s) is *(legal name(s)* of *(address)* .* The School District is *(legal name(s)* of *(address)*.* The written request for the hearing was submitted on *(date)*. The stated reason for the request was (*identify issues*).

   *If a representative, as opposed to the parent or superintendent, e.g., legal counsel will present the case, the representative should also be introduced at this time.

3. Describe that the Impartial Due Process Hearing is an opportunity for parents and school personnel to meet before an unbiased individual, the Due Process Hearing Officer, when there are differences about any matter relating to the identification, evaluation, educational placement of the student, or the provision of a free and appropriate public education.

4. Describe the role of the Due Process Hearing Officer during the hearing:

   a. To conduct the hearing in an orderly and unbiased manner;

   b. To provide an opportunity for full presentation of relevant testimony; and

   c. To arrive at a decision based solely on the testimony and other evidence presented during the hearing.

5. Review the hearing procedures which will be followed. For purposes of recording the hearing, all participants should:

   a. Identify themselves by name each time they speak; and

   b. Avoid using gestures *(e.g., nodding head instead of saying "yes")*.

6. Assure that parents have been given full opportunity to be notified, to understand, and to exercise their due process rights.

7. Restate the parents wish to have the hearing open or closed to the public at this time *(you* may, at this time, clear the hearing room if they have requested a closed hearing).

8. Ask if the Parents *(or his representative)* wishes to make a brief opening statement.*

9. Ask if the School District *(or his representative)* wishes to make a brief opening statement.*

***NOTE**: No questions shall be allowed during or after this statement.

BEST COPY AVAILABLE

PRESENTATION OF EVIDENCE AND TESTIMONY

THE HEARING OFFICER CAN USE THE FOLLOWING GUIDELINES DURING THIS PHASE OF THE HEARING:

1. The Hearing Officer may ask that witnesses leave the room until they are called to testify.*

***NOTE:** This is done if the hearing has been requested to be a closed hearing or a request to sequester the witnesses has been granted.

2. The Hearing Officer will usually call all witnesses for the District in the order requested. The Hearing Officer will then call all witnesses for the parent.

3. All witnesses should be seated near the Hearing Officer and the tape recorder, or court reporter.

4. Each time a new witness is called:

    a. The Hearing Officer will administer the affirmation oath or direct that it be administered.

    b. In the absence of legal counsel, the Hearing Officer will ask each witness to be identified by asking their:

        - legal name
        - address
        - position or title
        - relationship to student

    c. The party calling the witness is given the opportunity to ask their witnesses relevant questions.

    d. The party, will be given the formal opportunity to challenge or cross-examine the testimony and evidence of the witness.

    e. A period will follow for recross-examination of testimony and evidence presented.

134

   f. The Hearing Officer may ask for clarification of testimony, terminology or evidence when necessary, or such other information as the hearing officer may deem appropriate. This is especially true when the parent is pro se, that is, without representation.

   g. The Hearing Officer will ask if either party will require further testimony from the witness at a later time. The Hearing Officer will excuse the witness at this time unless one of the parties has requested they remain available.

5. When documentary evidence is submitted, the Hearing Officer must:

   a. Make a list containing the title of each document which is admitted and identify it as submitted by the Parent or the District, or jointly; and

   b. Keep a file of all documents entered into evidence.

6. The Petitioner and the Respondent may enter a statement of evidence at any time for the purpose of having the evidence or statement shown in the transcript of the hearing.

CONCLUDING REMARKS

1. The Hearing Officer asks the parties if they have any additional statements or evidence they wish to enter into the record of hearing *(i.e., to appear on the transcript of the hearing).*

2. The Hearing Officer then asks if brief summary statements will be given:

   a. By the District or a representative

   b. By the Parent or a representative

3. The Hearing Officer ends the hearing with:

   a. An overview of the due process and procedural safeguards

   b. What will happen next:

      A schedule for the submission of any post-hearing materials by the parties.

      The Hearing Officer will arrive at a decision which they will receive within 45 calendar days after the receipt of the request for a hearing.

   c. A statement of the procedures for appeal following the hearing.

QUESTIONS AND ANSWERS

WHAT HAPPENS IF THE PARENTS OR SCHOOL IS REPRESENTED BY LEGAL COUNSEL OR AN ADVOCATE

If either side is represented, the legal counsel/advocate may call witnesses, ask direct questions, and cross-examine witnesses for the opposing side. In addition, they may present the opening and closing statements for the party they are representing.

WHAT HAPPENS IF A WITNESS IS REPRESENTED BY LEGAL COUNSEL?

The legal counsel for a witness may only advise the witness on the testimony. He may not ask questions, cross-examine or participate in the hearing other than advising the client.

WHAT IS THE DECISION OF THE DUE PROCESS HEARING OFFICER BASED UPON?

The decision is based solely on the evidence and testimony presented at the hearing and is based on the preponderance of the evidence. The decision of the hearing officer will include findings of fact, conclusions, and reasons for these findings and conclusions. If the decision is to disapprove a proposed education program, it should include a statement as to what is an appropriate educational program for the student. If the decision is to approve a proposed educational program, it should include a finding that a less or more restrictive program could not appropriately serve the student's educational needs.

WHAT ARE THE RULES FOR SUBMITTING EVIDENCE?

The Hearing Officer need not observe the rules of evidence observed by the courts. She/He is free to accept into the record any evidence that bears on the issues and should allow witnesses to speak freely without interruption unless the testimony is unduly repetitious, irrelevant, or immaterial.

WHAT IF THERE IS AN OBJECTION TO TESTIMONY IN THE HEARING?

The Hearing Officer should make a note of the objection for the record, however, the testimony should continue *(unless currently irrelevant or unduly additive)* as the hearing is to provide a full opportunity to present all testimony and evidence that is relevant to the issue.

BEST COPY AVAILABLE

CAN THE HEARING OFFICER REQUEST AN INDEPENDENT EVALUATION OF THE STUDENT?

Yes, if the Hearing Officer finds that more information is needed to base a decision, he may request an independent evaluation of the student as part of the hearing. If the Hearing Officer orders the evaluation, the cost will be at the school's expense.

CAN THE HEARING OFFICER REFER TO DOCUMENTS NOT INTRODUCED INTO EVIDENCE?

No, under basic administrative law, the Hearing Officer may not refer to evidence not in the record of the hearing.

IF THE HEARING OFFICER HAS AN EDUCATIONAL PHILOSOPHY, SHOULD HE/SHE UTILIZE THIS IN MAKING HIS/HER DECISION?

No, the Hearing Officer's decision cannot be based upon what she/he has taken as a "known" that is not supported by fact or evidence in the record of the hearing. Often, the Hearing Officer will not ask a specific question during the hearing because the answer is already apparent to him/her. Her/His decision cannot be based upon that "already known answer" that is not in the record of the hearing.

It is important that the Hearing Officer ask questions on points of clarification and not rely upon his/her educational philosophy or own knowledge.

WHAT IF BOTH PARTIES IN THE DUE PROCESS HEARING REACH RESOLUTION?

If resolution is reach prior to the scheduled hearing, i.e. through a mediation process, the resolution shall be written by the mediator, signed by both parties, and provided to the Hearing Officer. The Hearing Officer shall notify all parties, i.e. witnesses, school personnel, and the State Office of Education, that resolution has been reached by both parties. The party requesting the hearing should be asked to document their intent to withdraw their hearing request.

CAN THE PARENT RECOVER ATTORNEY FEES?

If the parent prevails in the hearing, the parent can request from a court the recovery of reasonable attorney fees. The Hearing Officer does not have the obligation or authority to award attorney fees.

WRITING THE DECISION QUESTIONS AND ANSWERS

WHAT IS THE PURPOSE OF THE DECISION?

The purpose of the decision is to summarize the pertinent evidence presented at the hearing and to make a conclusion based upon the evidence to decide the issue. The Hearing Officer's responsibility is to decide what is legally appropriate for the student not whether the parents' or the district's position is correct. It is possible that based on the record the Hearing Officer will issue a decision which is different than either parties' position.

WHAT ARE THE LIMITATIONS IN THE DECISION MAKING PROCESS?

The Hearing Officer is limited to deciding the issues of the complaint and should not go beyond that issue in his or her decision *(e.g., if the parents contend that the school used improper evaluation methods and that the placement recommendation is invalid, the Hearing Officer should limit the decision to the issue of the evaluation procedure).*

The Hearing Officer must limit the decision to the type of placement in generic terms. The decision of the Hearing Officer cannot require placement in a specific classroom or with a specific teacher.

WHAT IS THE FINAL DECISION?

The final decision is a written summary which includes the following:

- identifying information about the hearing
- a summary of evidence and testimony presented
- the findings of facts, conclusions of law, rationale, and decision of the Hearing Officer
- a statement of the procedures necessary to obtain an appeal for review of the Hearing Officer's decision

The Hearing Officer prepares the final report based solely on the evidence and testimony presented at the hearing.

BEST COPY AVAILABLE

WHEN IS THE FINAL DECISION SUBMITTED?

The final report must be completed and mailed within 45 days following the request for the Impartial Due Process Hearing.

The final report is considered "submitted" when typed copies are sent to both parties by Certified Mail, Return Receipt Requested or delivered in person.

WHO RECEIVES A COPY OF THE FINAL REPORT?

A copy of the final report is mailed to:

1) The School Superintendent of the school district of student's residence;

2) The student's parent, guardian, or surrogate;

3) The student, if over 18 years of age;

4) Arizona Department of Education

DOES THE DUE PROCESS HEARING OFFICER MAINTAIN A COPY?

The Due Process Hearing Office maintains a copy of the verbatim transcript of the hearing, the submitted evidence, and final report.

The original copy of the verbatim transcript of the hearing, the submitted evidence, and final report is provided to the Arizona Department of Education.

CONTENT OF THE FINAL DECISION

I. The Cover Page

The cover page is a separate page for listing personally, identifiable information from the due process hearing. The Hearing Officer should place the personally identifiable information on the cover page, and refer to the parties in the body of the decision in generic terms (i.e., Mother, Father, School District). Under Federal Regulations, all hearing decisions must be forwarded to the State's Advisory Council. Therefore, by using generic terms in the body of the decision it will allow the reader to have the full decision without blacked out portions.

II. Decision

A. Introduction

This section should describe the process leading up to the issuance of the decision including the party requesting the hearing, date of request, whether the parties were represented by legal counsel or an advocate, the pre-hearing date, whether any continuance(s) were granted, hearing dates and post-submissions. This section should also clearly state the issue(s) which were the subject of the hearings.

B. Findings of Fact

This section which is required by the regulations sets out the evidence relied upon by the hearing officer to address the issues. It is suggested that the findings be numbered and reference where in the evidence the facts were established.

Example:

> The student was determined to be eligible for IEP services by the Multi-Disciplinary Team on June 1, 1996. *(Exhibit A, Testimony of Special Education Teacher)*

C. Conclusions of Law/Reasons

In this section of the decision the hearing officer analyzes and applies the facts to the applicable legal standard.

D. Conclusions/Order

The Hearing Officer must decide the issues presented to him/her. If it is found that the School District did not adhere to all of the legal requirements, the Order should specify clearly what must be done and a date for completing the action(s).

E. Appeal Process

The decision should refer to the applicable appeal process.

If this is the first tier hearing, the appeal statement should read:

1. The final administrative hearing appeal may be obtained through the Division of Special Education, Arizona Department of Education, which shall conduct an impartial review of the hearing.
    a. Such an appeal shall be accepted only if it is initiated within 35 days after the decision of the hearing officer has been received by the parties. An extension of time for filing the appeal may be granted by the Division of Special Education for cause. Appeals must be forwarded to the Division of Special Education, Arizona Department of Education, 1535 West Jefferson, Phoenix, Arizona 85007.

If this is the second tier, the applicable appeal process is:

1. Any party aggrieved by the findings and decisions made in a hearing or in an appeal review has the right to judicial review. The decision of the administrative hearing appeals officer shall be final at the administrative level.

F. Sign and Date the Decision

HOW TO WRITE FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

INTRODUCTION

A. The Ideal

Administrative decisions should be written so that they are understandable to everyone who is likely to read them. This goal assumes added importance when you consider that of the people who will read your decision, the least sophisticated may be most significantly affected by it. This consideration notwithstanding, you can and should meet the standard of writing a comprehensible decision without any compromise of scholarship.

B. Suggestions pertinent to the Writing of Facts and Conclusions

1. Strive to be concise, as opposed to simply brief.

2. Short sentences are preferable. Long sentences are not necessarily undesirable, but they may be manifestations of the following undesirable traits:

(a) The writer's reluctance to make a straightforward statement;

(b) The writer's failure to elicit sufficient evidence to support a clear finding of fact;

(c) The writer's failure to conduct a thorough analysis so that a clear conclusion may be drawn.

3. Construct an outline, especially in complex cases. In the long run, preparing an outline probably saves time. An outline is a good organizational tool, and its effective use will produce a concise and coherent decision. After outlining your proposed findings and conclusions, you can review your findings in light of your proposed conclusions. You will be able to more tightly connect both.

4. It is very easy to inadvertently write a conclusion of law, or conclusionary language, into your findings of fact. The reverse is also true. Careful proofreading is usually the best remedy for this and other errors.

5. If you address procedural problems in your decision in addition to dealing with the merits, set forth findings relating to the procedural issues first, followed by findings on the merits. This format should also be followed in writing conclusions.

BEST COPY AVAILABLE

II.

WRITING FINDINGS OF FACT

A. The most comprehensible way to set forth findings of fact is in chronological order.

B. The Importance of the Record

1. Adherence to the record is imperative. As a decision-maker, you live or die by your record, since it is the basis for your findings, which support your conclusions, which, in turn, dictate your order.

2. Each finding of fact should be supported by competent evidence of record. In those instances when your findings thus supported do not support a conclusion, you will have to lay a foundation for a conclusion by resorting to related evidence on the record and by drawing logical inferences therefrom. When you "fill gaps" in this manner, consider using the following procedure:

(a) State that you are without evidence which would, by itself, support a finding of fact;

(b) Set forth the evidence in the record which you will use as a basis for drawing the inference;

(c) Reach a conclusion as a result of your analysis of the associated facts or your inferences drawn therefrom. This last step would appear in the "conclusions" portion of your decision.

3. Occasionally, an effective use of the record will consist of setting forth verbatim excerpts from the testimony or other evidence.

C. Evaluating Conflicting Evidence

When testimony or other evidence is contradictory on a critical point of a factual nature, you must resolve the conflict. Sometimes the most coherent method of introducing the problem is to set forth the contentions of the parties. When this is done, care should be taken to state the contentions precisely as the parties have. If you can resolve the conflict by reference to findings you have already made which are consonant with one party's contention, your resolution of the problem should be set forth as a finding. This is preferable to merely stating that "The evidence was in conflict on this point," or breaking off your treatment of the issue after having set forth the parties' contentions, necessitating your return to the problem later in your conclusions.

III.

WRITING CONCLUSIONS OF LAW

A. Format

First identify the pertinent statutes and regulations. In succeeding paragraphs, show the proper application of the rules to the facts of the case at hand. If your decision will turn on a legal principle or concept, you should trace the principle's definition and development through administrative and judicial decisions and then show its application to the present facts.

B. Relationship to Findings of Fact

If, in your findings, you have dealt with multiple issues, address the issues in your conclusions in the same sequence as you did in your findings.

C. Evaluating Conflicting Evidence

1. In General

If brief reference to other findings cannot be made which would enable you to resolve conflicting evidence in your findings (see section II. C. above), and it will be necessary to explain at some length why you accord credibility to one party's testimony rather than to the other's, the explanation can be set forth as a conclusion. Your rationale in these instances may be the result of your observation of the witnesses, the logical persuasiveness of their testimony, or the extent to which each witness' testimony coincides with other competent evidence.

2. Inconsistent Statements by a Witness

When a witness has made inconsistent statements, explain why you find one statement more worthy of belief than the other. Your rationale may be that you choose to believe the statement made at the time most proximate to the events germane to the issue, or the statement made when the witness was unaware of any adverse consequences the statement might have.

D. Special Considerations

In cases involving hearsay evidence, official notice, burden of proof, or any legal principle requiring unique treatment, first define the principle or concept, explain its application, and show how it affects the case at hand.

E. Writing Style

1. Use a numbered format for your findings and conclusions (most administrative decisions are required to be written with numbered findings and conclusions). For the sake of clarity or emphasis, it is useful to refer to a previous paragraph as opposed to reiterating the entire finding or conclusion.

2. Minimize use of the terms "clearly," "it seems that," or words of similar import. If you find yourself about to write in that manner, ask yourself "Why is it clear?" or "Why does it seem that way?" and write the answers to those questions in your decision.

3. Minimize use of the subjunctive mood, such as "We would note the following" or "The undersigned would conclude." Direct statements, such as "The undersigned concludes" make a stronger impression.

IV.

WORDING THE ORDER

The Order is a simple, clear statement of the disposition of the case. It is here that you order the parties to take the action you have determined is appropriate. The importance of writing a specific order cannot be overemphasized. If the case is appealed, you do not want to run the risk that your order will be misinterpreted or rendered unenforceable. It is not necessary or desirable to reiterate your conclusions in the order; however, if, for example, you have imposed a timeline for the parties to act upon, be sure and identify that timeline in the order. Avoid leaving the time frame open-ended, e.g., "Within a reasonable time."

Evaluating the Fairness of Special Education Hearings

STEVEN S. GOLDBERG
Beaver College
PETER J. KURILOFF
University of Pennsylvania

ABSTRACT: The U.S. Congress mandated due process hearings in special education disputes to ensure parental involvement in educational decision making and to promote individual justice. The present study explored two kinds of justice, defined as objective and subjective fairness, and examined parent and school officials' subjective experience of the fairness of their hearings. Findings indicate that hearings are not *achieving subjective fairness. Neither school officials nor parents felt positively about the experience. Supplements to hearings, such as mediation and negotiation, should be studied to see if they are more effective vehicles for achieving congressional intent and for avoiding costly and emotionally draining hearings.*

☐ It has been 15 years since the U.S. Congress, through the Education for All Handicapped Children Act of 1975 (Public Law 94-142), required the states to provide due process hearings to parents who objected to the educational classification, program, or placement that schools offered their children. The mandated hearings included all the elements generally thought to be essential to achieving individual justice (Friendly, 1975). Participants have the right to receive adequate notice, to examine school records, to be represented, to call and cross-examine witnesses, to be heard by an impartial hearing officer, and to appeal adverse decisions.

Congress imposed these procedural safeguards not only on the assumption that they would secure parental participation in educational decision making vital to children's welfare, but also in the traditional belief that such safeguards are the best way to achieve *accuracy* in fact-finding and *fairness*. Accuracy, as it relates to the "appropriate education" mandated by P.L. 94-142, may be defined as the correspondence of the hearing officer's decision with the true facts of the child's situation and with an appropriate application of relevant rules to those facts (Mashaw, 1974). Within this framework, *fairness* becomes the degree to which hearing-officer decisions produce accurate decisions.

DOES DUE PROCESS FOSTER ACCURACY OR OBJECTIVE FAIRNESS?

Despite the fact that the imposition of due process hearings to resolve special education represents a major intrusion of the judicial model into the field of education, little research has examined their capacity to produce fair decisions. Researchers have been inhibited by the difficulty of studying events as complex as hearings. They have been daunted too by the problem of operationalizing the idea of fairness. To be viewed as "objectively" fair, a decision must correspond to the true facts of the case.

In a laboratory experiment (involving a criminal case, for example), it might be possible to examine the capacity of due process procedures to establish the true facts of a case—when the researcher stipulates all the circumstances of a simulated crime in advance and the "judge's" decision is confined to the simply binary choice between guilt and innocence. In the case of a real crime, however, the problem becomes more difficult because the facts are always open to varying degrees of interpretation. When the issue is what constitutes an appropriate education for a particular child (Kirp, Buss, & Kuriloff, 1974), objectivity seems to be an almost impossible goal. There are two major reasons for this.

First, abundant evidence suggests that equally well-trained professional educators, working in good faith and under the best circumstances in a nonadversary context, cannot agree on either the assessment or placement of children with disabilities (Flor, 1978; McDermott, 1981). This inability to agree on the true facts of special education cases is consistent with findings from other fields indicating that psychiatrists cannot agree on psychiatric diagnoses (Freeman, 1971; Sandifer, Hordern, Timbury, & Green, 1968; Sandifer, Pettus, & Quade, 1964; Spitzer & Fleiss, 1974) or clinical psychologists on emotional and behavioral disorders (Achenbach & Edelbrock, 1978; Little & Shneidman, 1959; Zubin, 1967).

Second, while it may be possible to attribute such disagreements in psychiatric and psychological cases to a lack of current knowledge, the problem in educational decision making is that there is *no* one "best" or "most appropriate" placement. In fact, a whole range of programs exist that can help a particular child, and the degree to which they do depends on a complex mix of variables ranging from the child's current status and personality to the personality and training of the particular teacher and the nature of the other children in the class. Thus, the ability to choose an appropriate program depends on the amount of knowledge decision makers have about the child, what resources are available, and the *art* of matching them effectively.

In this light, accuracy does not seem to hold much promise as a criterion for establishing an objective link between the provision of a due process hearing in special education, as an input, and fairness, as an outcome. One study (Kuriloff, 1985) substituted for "fairness and accuracy," the capacity of parents to influence the hearing officer's decision in their favor. While not as grand a value as "Truth," the legal literature recognizes the importance of participants' capacity to influence administrative decision making as a criterion of justice, when their vital interests are at stake (Buss, 1979; Friendly, 1975; Mashaw, 1976). Using this as a measurable standard of justice, Kuriloff found that the way parents used due process was associated with the results they achieved. Parents who called more witnesses, offered more exhibits, presented their cases more effectively, and questioned the school's witnesses more thoroughly, won their cases more often than parents who used the procedures less effectively.

When justice is defined as the capacity to influence the outcome of official decisions in a desired way by making effective use of adversary procedures, due process hearings appear to be achieving what Congress had in mind when it imposed them on special education. But this objective measure of fairness tells us nothing about the experience of participants as they go through the process, something Congress also cared about (Neal & Kirp, 1985).

DOES DUE PROCESS FOSTER THE PERCEPTION OF FAIRNESS?

Much experimental evidence supports the idea that people who have more access to adversary procedural protections, including the option to appeal unfavorable decisions, feel more fairly treated than those who have less access, regardless of whether they "win" or not (Sheppard, 1985; Thibaut & Walker, 1975). Field studies in traffic and small claims courts support these findings, revealing that the main determinant of satisfaction with legal authority is perceived procedural fairness, not penalty (Tyler, 1984). Studies of people facing more severe penalties, however, have shown a relationship between outcome and perceived fairness (Casper, 1978). This suggests that as the outcome becomes more important to the parties, their standards for judging the treatment they receive may shift from procedural fairness to obtaining what they desire. But perhaps the reality is more complex.

What people value most in a given situation probably depends on a subtle calculus involving their judgment about their emotional and financial investment, their temperament, and the level of their moral development or capacity to "take the role of the other." It seems reasonable, however, to assume that most people value both good outcomes and fair treatment.

For example, most children want the biggest piece of cake but are satisfied when their parents require one sibling to cut the cake and then allow the other sibling to choose the piece. Again, after entering the state lottery, most people who lose do not feel wronged unless an unfair procedure was followed. In contrast, when a person sustains a serious injury because of someone else's negligence, an elaborate trial, replete with procedural safeguards, that ends in no award can never replace a judgment covering medical costs, pain, and suffering.

But, to take a different example, an accused criminal knows whether he or she has actually committed the crime. If a guilty person receives full procedural protection, is convicted, and still feels unfairly treated, presumably the explanation lies in massive psychological denial. Neither the law nor the average citizen would have much concern for such feelings of subjective injustice. Yet, even in the case of the self-acknowledged criminal, it is likely he or she would still feel unfairly treated if full procedural safeguards had been denied. Thus, having one's "day in court" may be viewed as a necessary, but not a sufficient condition for what we are calling the subjective sense of justice. Certainly, this seems probable in the case of parties to special education disputes.

Following this logic, we would expect parents and school officials to share a sense of the necessity of due process hearings as a final resort, no matter how distasteful they find them (Neal & Kirp, 1985). But no one really knows for certain what the "true facts" are in special education cases and, therefore, what an "accurate decision" would look like; and, indeed, more than one outcome can be equally beneficial (or equally deleterious) for the child. It seems reasonable, then, to expect parents to rely on what they themselves believe is best for their children. If experts disagree as widely as the research suggests, how much confidence can such parents be expected to have in a hearing officer's adverse decision? Assuming that parents, more than anyone else, have a large personal investment in their children's welfare, we hypothesize that their perceptions of fairness will be correlated with getting what they want for their children. Further, since getting what one wants may be more a function of the resources one brings to bear in using procedures, than on the availability of the procedures per se, it is likely that the perception of fairness will be associated with parents' socioeconomic status (SES), as well as with outcome (Spohn, Gruhl, & Welch, 1982).

In contrast, for school officials, perceived fairness may be less strongly associated with outcome because arguably they have less emotional investment in any one child than do the child's parents. Of course, depending on the circumstances, a particular case may involve extra costs to a district, or it may set a precedent that would require different administrative or instructional arrangements for a large number of other children. Even then, however, it seems reasonable to assume that outcome is less likely to affect directly and personally the school's representative to the hearing in the way it must affect parents.

The present research was designed to discover how parents and school officials evaluate the subjective fairness of special education due process hearings. In particular, we wanted to know if participants believed they were accorded the procedures mandated under P.L. 94-142, and if they believed their hearings were "fair" in that they had been allowed to participate fully and had been informed of all reasons for the decisions. Further, we wanted to find out if they believed the outcomes of the hearings they went through were "accurate" reflections of the quality of the evidence presented at the hearings. Most important, we wanted to find out if each set of parties believed they had been treated fairly in an overall sense and were satisfied with the decisions of the hearing officers. Finally, we sought to discover if parents' perceptions varied as a function of their SES and if the perceptions of both parties varied as a function of having won or lost the case.

METHOD

Subjects

Parents and school officials who participated in open, special education due process hearings in Pennsylvania between 1980 and 1984 were the subjects of this study. A total of 282 hearings were held during that period, of which 66 (23.4%) were open to the public. This percentage is in marked contrast to earlier Pennsylvania hearings when the proportion of open-to-closed hearings was almost reversed (Kuriloff, Kirp & Buss, 1979). Parents and school officials we interviewed agreed that many of the earlier hearings were brought by activist parents and advocates who kept them open both as a strategy for bringing public pressure to bear on districts and as a means of community education. They doubted whether the choice reflects major differences between the two groups of hearings. Indeed, Kuriloff et al. (1979) found no statistically significant differences in parent and school behavior or hearing-officer decisions in open versus closed hearings held during the first 4 years of hearings in Pennsylvania. Still, prudence suggests caution in generalizing present results beyond participants in open hearings.

During the fall of 1984, we traced the participants in the 66 open hearings. We obtained responses from 30 pairs of parents and school officials who had participated in hearings together. We obtained additional responses from 7 parents and 13 officials whose adversaries had moved and could not be located. We tested for statistically significant differences between results for the true pairs and the nonpaired respondents. Finding none, we included all respondents in the final analyses. Thus, the total sample included parents and school officials who had participated in 50 hearings (76% of all open hearings during the time period we examined and 18% of all hearings).

Parents represented all five of Hollingshead's (1971) social classes, but the sample was skewed toward the high end of the scale, including 2 lower, 5 lower middle, 12 middle, 9 upper middle, and 9 upper class families.

School officials represented 34 of the Commonwealth's 501 districts. Fourteen, or 28% of the cases, were from Philadelphia. This corresponds roughly to the percentage of cases (30%) the city, by far the state's largest, tends to produce each year. Two cases each were from Pittsburgh and Erie, the Commonwealth's 2nd and 3rd largest districts. Two others were from Bristol, the 14th largest. The other 30 cases came from districts scattered throughout the state. Districts were quite representative in their diversity. In size, they ranged from tiny Tri Valley with a population of 6,879, to Philadelphia with a population of 1,688,210. Median family income ranged from a low of $13,167 in Tussey Mountain to a high of $34,923 in Lower Moreland. The proportion of families below the poverty level ranged from a low .15% in Mt. Lebanon to a high of 16.5% in Philadelphia, while the proportion of minority children of school age ranged from .1% in Tri Valley to 39.7% in Philadelphia. Education varied similarly. Forty-nine percent of State College's adults were college graduates, while only 5.1% of Tussey Mountain's adults had college degrees. Because of the inclusion of Philadelphia, Pittsburgh, and Erie, the percentages of families below the poverty level (12% vs. 7.7%) and minorities (26% vs. 9.6%) were higher than those found in the state generally; and the percentage of college graduates (8% vs. 13.5%) was lower. These differences correspond to the fact that larger, urban districts also account for a disproportionate number of due process cases.

Finally, this is a study of people who were involved in hearings over a 4-year period. For those whose hearings were in 1984, only several months had elapsed before they were interviewed; for those whose hearings were in 1980, several years had gone by. Thus, as in all retrospective studies, this study is subject to the limitations imposed by distortions of human memory, as well as the genuine changes that people's views undergo as circumstances change.

Instruments

Transcript Data Form. To collect data relating to the nature of the hearing, we used an instrument based on one developed by the Project on Student Classification and the Law (Kuriloff, 1985; Kuriloff et al., 1979). Participants were asked the date of the hearing and the decision, the name of the school district, characteristics of the child (age, sex, previous special education experience, and current placement), and whether legal or other representation was used by the parents and the school district. The instrument also contains a 5-point Likert-like scale measuring the hearing outcome. A hearing officer's decision is rated from complete loss for parent to complete win for parent using criteria developed by Kuriloff et al. (1979). The scale has been shown to be highly reliable and easy to use (Budoff & Orenstein, 1982; Kuriloff, 1985; Kuriloff et al. 1979).

Parent Interview Questionnaire (PIQ). This instrument was designed to measure participants' perceptions of the fairness of the major procedural elements of the hearings. It is divided into seven short sections containing 23 questions. The first 5 questions ask parents to use a 7-point Likert scale to rate the fairness of prehearing and hearing procedures; the fairness of the hearing itself; the accuracy of the hearing officer's decision, as well as their overall satisfaction with the hearing and its outcome; and their evaluation of the results of the entire process for their child. For example, parents were asked to what degree the school made all evidence available to them, to what degree they felt they had the opportunity to present their side of the story, to what degree they believed they had received all their legal rights, and to what degree they felt the hearing had been fair. The sixth section asked parents to rate how much of what they sought they had actually gotten out of the hearing and how they felt about it now. The final section contained the questions of the Hollingshead Four Factor Index of Social Status (1971).

School Official Interview Questionnaire (SOIQ). This instrument, like the PIQ, was designed to measure participants' perceptions of the fairness of the hearings. It is divided into five short sections containing a total of nine questions. Officials were asked to use a 7-point Likert scale to rate their perceptions of the fairness of the hearing procedures and outcome, their judgment of the accuracy of the decision, their satisfaction with the hearing and its outcome, and their assessment of how much of what they had wanted they had gotten. Questions paralleled those of the PIQ. Both the PIQ and the SOIQ were pretested on a separate group of hearing participants.

The Hollingshead Four Factor Index of Social Status (1971). This is a widely used measure of SES. It contains nine questions concerning respondents' educational level and occupation and results in classifications of lower, lower middle, middle, upper middle and upper class. For convenience, the scale was included as part of the PIQ.

Procedures

The transcripts of all open hearings held between 1980 and 1984 were evaluated using the *Transcript Data Form* to determine the outcome of hearing-officer decisions according to criteria established by Kuriloff et al. (1979). Parents and school officials were then interviewed over the telephone and asked to reply to the questionnaires, using a standard approach described by Dillman(1978).

Data Analysis

Because we were dealing with phone interviews, we could ask only a few key questions. This posed problems, given our intention to analyze responses to individual items, especially as the ability of respondents to discriminate reliably among items on a 7-point scale proved questionable. To correct for this problem, we reduced the scales from questionnaire variables to a single, trichotomy where a variable's original most favorable two anchors ("All," "Almost All," "Highest Degree") were construed as *Positive* perceptions, lowest two anchors ("None," "Almost None") as *Negative*, and medial three anchors ("Half," "Some," "Moderate Degree") as *Neutral*. This permitted comparable analyses of data across variables and more parsimonious presentation and interpretation of results.

The scales presented another analytic problem. They are theoretically and probably mathematically highly correlated. We therefore needed a strategy to preclude the likelihood of Type I errors—that some relationships that appeared significant were, in fact, artifacts of the intercorrelations of scales. In addition, inspection of the distributions for parents and school officials revealed abnormal distributions skewed in opposite directions, as well as unequal cell sizes. This demanded a nonparametric test. In comparing the disparate perceptions of parents and school officials, we therefore chose as our statistic the test of the standard error of proportional differences (Ferguson & Takane, 1988) and controlled the compounding of spurious error using the Bonferroni method (Miller, 1966). Finally, to assess the degree to which participants' perceptions of fairness and satisfaction were related to their experience of winning or losing, we correlated their ratings with outcome, again controlling for simultaneous statistical tests, using the Bonferroni method.

RESULTS

Parental Perceptions of Prehearing Treatment

Timely notice and prior access to the evidence have long been considered essential to a fair hearing (Friendly, 1975). Within the context of special education, parents must know of their right to a hearing and have time to prepare their case. But they also must be aware of the content of their children's school records and must understand what they mean. The great majority of parents (33 out of 37, or 89%) believed they had received timely notice in advance of the due process hearing. However, perceptions were rather mixed on whether other prehearing activities were conducted appropriately. Only 24% of the parents reported that all or nearly all pertinent school records had been made available, and another 24% reported that no or nearly no such records had been forthcoming. More disturbing was a claim by over half of the parents (51%) that schools provided no or almost no explanations of the meaning of whatever records were provided. The picture does not grow brighter when we turn from prehearing perceptions to parent and school views of the hearings themselves.

Participants' Perceptions of the Fairness of Hearings

Table 1 presents and contrasts parent and school perceptions of elements key to procedural fairness. It shows large and statistically significant differences between the parties' perceptions of the degree to which they were accorded their legal rights. Whereas over 95% of the school officials had positive perceptions, believing they had received all or most of their rights, only 51% of the parents agreed. Furthermore, no school of-

TABLE 1
Distribution and Relative Disparity of Parents' and School Officials' Perceptions of the Special Education Hearing

Interview Questionnaire Variable	n	*Perception (% Response)* *Positive*	*Neutral*	*Negative*	*Significance and Trends of Disparate Perceptions*[a]
Opportunity to present their position					
Parents	36	58.3	16.7	25.0	n.s.
School officials	43	83.7	16.3	0.0	
Legal rights accorded to them					
Parents	37	51.4	24.3	24.3	Officials more positive***
School officials	43	95.4	4.6	0.0	
Fairness accorded to them					
Parents	37	40.5	24.3	35.2	Officials more positive***
School officials	40	87.5	7.5	5.0	Parents more negative*
Adequacy of hearing officer's explanations					
Parents	37	59.5	21.6	18.9	n.s.
School officials	42	81.0	11.9	7.1	
Accuracy of hearing officer's decision					
Parents	36	36.1	19.4	44.5	Officials more positive***
School officials	41	80.4	9.8	9.8	Parents more negative**
Satisfaction with hearing officer's decision					
Parents	36	33.3	8.3	58.4	Officials more positive**
School officials	43	72.1	16.3	11.6	Parents more negative***
Overall satisfaction with hearing					
Parents	37	35.1	10.8	54.1	Officials more positive*
School officials	43	69.8	20.9	9.3	Parents more negative***
Current response to hearing experience					
Parents	36	11.1	22.2	66.7	Officials more positive**
School officials	40	47.5	20.0	35.5	Parents more negative*

Note: The sum of percentages across each row for parent and school officials perceptions, respectively, is 100%.

[a] Tests for significant disparity between parent and school official perceptions are based on the standard error of proportional differences (Ferguson & Takane, 1988) corrected for simultaneous statistical contrasts across 8 questionnaire variables by the Bonferroni method (Miller, 1966).

$^{*}p < .05$. $^{**}p < .01$. $^{***}p < .001$.

ficials felt negative about the rights accorded them; but 24% of the parents had negative feelings. The differences in positive views were large and statistically significant.

There were equally large, significant differences between both parents and school officials' positive and negative perceptions about the overall fairness of their hearings. Eighty-eight percent of the officials, but only 41% of the parents believed the hearings were completely or almost completely fair. Indeed, a larger number of parents (35%) had very negative views, perceiving the hearings as substantially unfair.

Interestingly, parents and school officials did not attribute the unfairness to the inadequacy of hearing officer explanations. Indeed, they agreed substantially about the degree to which hearing officers explained the bases for their actions. Eighty-one percent of the school officials and 60% of the parents were very positive, claiming that the hearing officer's explanations were clear most or all of the time. But this relative agreement did not extend to their perceptions of accuracy—the extent to which hearing-officer decisions were based on the evidence presented at the hearing.

Table 1 shows that 80% of the respondents from schools, but only 36% of the parents, believed the decisions were fully or substantially accurate. Conversely, only 10% of the school officials but 45% of the parents believed the decisions

TABLE 2
Correlations Between Hearing Outcome and Perceptions of Satisfaction and Fairness by Parents and School Officials

Interview Questionnaire Variable	*Parent* (n=*33*)	*School Official* (n=*42*)
Opportunity to present their position	.54*	.24
Legal rights accorded to them	.22	.25
Fairness accorded to them	.62**	.38
Adequacy of hearing officer's explanations	.53*	.19
Accuracy of hearing officer's decision	.68**	.60**
Satisfaction with hearing officer's decision	.61**	.67**
Overall satisfaction with hearing	.74**	.58**
Achievement of initial goals	.61**	.38
Current reaction to hearing experience	.07	.18

Note: Statistical tests are controlled for multiple contrasts across 9 questionnaire variables by the Bonferroni method (Miller, 1966).
$^{*}p < .05$. $^{**}p < .01$.

were substantially inaccurate. Both sets of differences are large and highly significant. In about the same proportions, and about at the same level of significance, both sets of parties were inversely satisfied with the decisions they received. Seventy-two percent of the school officials, but only 33% of the parents, were positive about the outcome of the hearings; conversely, 12% of the school officials and 58% of the parents were negative.

Not surprisingly, the overall satisfaction of the parties with the hearings was similar to their ratings of the accuracy and fairness of the decisions. Seventy percent of the school officials, but only 35% of the parents, felt positive about the experience. Only 9% of the school officials were negative, in contrast to a majority of the parents (54%) who expressed no or almost no satisfaction.

Finally, we asked both set of parties to rate their current feelings about the entire experience of participating in a hearing. Once again, the same differences appear. Parents were predominantly negative (67%), whereas school officials were almost evenly split between feeling positive (48%) and negative (33%). While these differences are large and statistically significant, they indicate a substantial *lack* of satisfaction on the part of a majority of both sets of parties.

The Relationship Between Perceived Fairness and Winning

After comparing parent and school-official perceptions of fairness and satisfaction, we wanted to know if their retrospective assessments were associated with getting the outcome they desired. Table 2 shows that on seven of nine parental measures they were strongly related. (We were able to include in the correlational data a measure of the parties retrospective judgment concerning whether they had achieved their goals through the hearing. Because this measure had been scaled on a 5-point scale, instead of a 7-point scale, it could not be included in prior analyses.) Though school officials' perceptions were less strongly correlated, they were still significantly related on three of nine measures.

On all but two measures, parents who got more of what they wanted in the decision perceived hearings to be fairer and more satisfactory than did parents who got less of what they wanted. Only parents' perceptions of the degree to which they were accorded their legal rights and their current judgment of the hearing experience were unrelated to outcome. For schools, all but one of the relationships were less strong than for parents, and six did not reach significance. School officials' assessments of being afforded their legal rights and an opportunity to participate in the hearing, as well as their judgments regarding the fairness of the hearing officer and their current feelings about the experience, were unrelated to the outcome of the decision. But, on the major questions concerning their views of the accuracy of the hearing officer's decision, their satisfaction with the decision, and their satisfaction with the entire hearing process, the more they won, the more they perceived the hearings as fair and the more satisfactory they rated them; and the less they won, the less they perceived the hearings as fair and the more dissatisfied they were.

Socioeconomic Status, Perceived Fairness, and Outcome

Finally, to check the hypothesis that parent perceptions of fairness varied as a function of their family SES as well as a function of their "winning," product-moment correlations were calculated between the Hollingshead Index and each questionnaire variable. Even without controls for simultaneous statistical tests, no correlation achieved statistical significance. Neither did SES correlate with outcome.

DISCUSSION

When justice is defined as the existence of a strong, reliable, predictive relationship between effectively using the elements of due process and gaining a favorable outcome, due process hearings appear to be achieving one goal Congress intended when it mandated them in special education disputes (Kuriloff, 1985). But this kind of objective fairness is not all Congress had in mind. It also wanted to ensure that parents could participate in crucial educational decisions about their children, and to come away feeling they had been fairly treated (Friendly, 1975; Neal & Kirp, 1985). The findings of this study add support to earlier, largely anecdotal evidence (Kirp & Jensen, 1983) that special education hearings *do not* achieve this more subjective form of fairness.

At the prehearing level, most parents believed they had been notified in a timely fashion but not that schools had explained their children's records adequately. Reflecting on their experience in the hearings, a majority of the parents believed that hearing officers explained their actions fully. A majority also thought they had the opportunity to adequately explain their position and that they had been accorded their rights. But only a minority of parents thought that the hearings were fair or the results accurate. It is not surprising, then, that a large majority of the parents reported being unsatisfied with the overall experience. On every measure, school officials perceived hearings as fairer and more satisfactory than parents. Of course, they tended to win more often than parents did.

Parents' views were unrelated to their SES, but were associated with the outcome of the hearing. Regardless of their SES, parents who won something tended to view all aspects of the hearings, except hearing officers' explanations, as more fair than those who did not. To a lesser degree, school officials' perceptions of fairness were shaped similarly by how successfully they achieved their objectives. Because parents are likely to have a greater emotional investment in the outcome than are school officials, this finding supports an emerging hypothesis in the literature that, in matters of major importance to them, people judge fairness by outcome more than by the procedural safeguards accorded them (Lind & Tyler, 1988; Tyler, 1984). Put differently, procedures may be viewed as a necessary but not sufficient condition for fairness when the stakes are high and the validity of any given outcome is ambiguous.

These findings have two important implications for research and practice. First, experimental studies of procedural justice that do not take peoples' "stakes" into account may draw false conclusions about the relationship between procedures as inputs and perceived fairness as the outcome of a legal system. Second, a strong effort should be made to explore supplementary forms of dispute resolution to see if they are capable of producing fairer, more satisfactory solutions than formal due process hearings. Kirp et al. (1975) have discussed several of the most promising models. In particular, studies should focus on negotiation and mediation. Since these models are designed to achieve satisfaction by achieving a mutually satisfactory agreement, not necessarily the one that most accurately conforms to the facts, they should foster perceptions of subjective fairness; and the issue of objective fairness no longer would be in question.

Given the strong, contrasting perceptions of parents and school officials, it is striking that the majority of both sets of parties felt either neutral or negative about the entire experience. Separate from any justice they may produce, hearings seem to have large personal and transactional costs. Many parents and school officials believed the hearings were emotionally traumatic. One parent who not only won, but also believed she had been accorded the appropriate procedures, bitterly complained of the system:

> It's a waste of money. It shouldn't have to go so far. It was a personal thing. They didn't think I'd do it. It cost me grief and aggravation. It cost them money which they could have used to educate.

For another parent, the process "was a traumatic experience. We suffered emotionally and financially." To a third, the hearing was "long and involved, very grueling, emotional, expensive, and very stressful." A school official, who also gave the highest favorable ratings for all aspects of the system, agreed that the experience was not worthwhile, saying:

> My views have changed as a result of going through the hearing. The law isn't bringing about what it's supposed to. It's too costly. It's misleading parents. I have very negative views of the law.

Parents and school officials believed adversary hearings created unnecessary antagonisms between them. According to one special educator: "I disagree with the system. Parents think we're the adversaries. Regulations are slanted to parents. We're professionals. We do our job and don't receive help." Another school official related how, in his hearing, "the parents had no case and, in general, off-the-wall people use the hearings to harass the school district." Indeed, many school representatives believed the hearings were forums used by special interest groups to achieve their political ends. One administrator reported: "This was a test case by the Association for Retarded Citizens. We have had amicable settlements working with parents before. The parents had agreed to the proposal before ARC got involved."

Parents felt equally strongly that the hearings were often simply an arena for conflict. One, who believed hers had been very fair, said: "It's like a war. You're the enemy. It's like walking into a combat zone. The due process system doesn't do anything. The professionals come at you." Another said:

> Things could have been resolved beforehand. They wanted to show me they couldn't be challenged. I have a funny feeling there's going to be another fight. I'm tired of fighting. They take you to the end to put the pressure on. You're not even a person. I don't know if I'd go through it again. It changes your whole life.

Yet, for a few parents, hearings were a positive and liberating experience. They were able to take control of the process and use it to influence their children's educational program. For example, a parent who won her case saw the experience as one that freed her of dependency:

> I'd do it again in a minute. It was my son's entire life at stake. It totally changed my entire life. It was the most difficult thing I've ever done. We fought for two years. It cost us over a thousand dollars in legal fees, travel, experts. They put us through all that crap unnecessarily. You can fight city hall. I can do anything important.

This mother's experience expresses the highest hopes one could have for mandating due process hearings as a method of special education decision making. But the overwhelming amount of data from this study, as well as that collected by others in a more anecdotal fashion (Kirp & Jensen, 1983), suggests such an experience is all too rare. Certainly the major belief expressed to us by parents and special educators was that the legal model is ill suited to resolving educational disputes. Yet not one parent or administrator was willing to claim that he or she did not have at least a "bottom line" right to request a hearing if alternative methods failed to resolve a disagreement.

CONCLUSION

It is this ultimate belief of parents and school officials in the need for due process that could easily lead us to the conclusion that hearings are necessary in cases where irreconcilable conflict exists. Despite many perceptions that the system was inaccurate and unfair, despite many feelings that the entire experience was negative, every parent and school official interviewed agreed that the opportunity for due process should be kept in place. Perhaps such views express Americans' profound historical faith in procedural safeguards. Perhaps too, it is this irreducible belief that makes the availability of due process a necessary condition for people's sense of subjective fairness. Yet, in their own words, parents and school officials eloquently stated why it is not sufficient. In expressing the pain they experienced during the process, they mirrored the reservations of Judge Learned Hand when he noted that "as a litigant, I should dread a law suit beyond almost anything else short of sickness and of death" (Roth, p. 91).

The question then, is really not of doing away with due process (Goldberg & Kuriloff, 1987), but of finding ways to prevent disputes between parents and schools from landing in court. If schools can come to appreciate the profound feelings of protectiveness and identification evoked in parents whenever questions are raised about a child's development, they may begin to find new ways of collaborating with them from the very beginning (Handler, 1986). Only sensitive, early interventions, that involve professionals and parents working together, are likely to avoid the costly, emotionally draining battles that erupt once they come to disagree on what constitutes an appropriate education for the child.

REFERENCES

Achenbach, T., & Edelbrock, C. (1978). The classification of childhood psychopathology: A review and analysis. *Psychological Bulletin, 85,* 1275-1301.

Budoff, M. & Orenstein, A. (1982). *Due process in special education: On going to a hearing.* Cambridge, MA: Ware.

Buss, W. (1979). Easy cases make bad law: Academic expulsion and the uncertain law of procedural due process. *Iowa Law Review, 65,* 39-48.

Casper, J. (1978). Having their day in court: Defendant evaluation of the fairness of their treatment. *Law and Society Review, 12,* 237-251.

Dillman, D. (1978). *Mail and telephone surveys: The total design method.* New York: Wiley.

Education for All Handicapped Children Act (P.L. 94-142). (1975). 20 U.S.C. Sections 1401, *et seq.* (1982).

Ferguson, G. A., & Takane, Y. (1988). *Statistical analysis in psychology and education* (6th ed.). New York: McGraw-Hill.

Flor, J. (1978). Service provider agreement and special education reform. *Dissertation Abstracts International, 39,* 6061A. (University Microfilms No. 7908734)

Freeman, M. A. (1971). A reliability study of psychiatric diagnosis in childhood and adolescence. *Journal of Child Psychology and Psychiatry, 12,* 43-54.

Friendly, H. (1975). Some kind of hearing. *University of Pennsylvania Law Review, 123,* 1267-1317.

Goldberg, S. S., & Kuriloff, P. J. (1987). Doing away with due process: Seeking alternative dispute resolution in special education. *Education Law Reporter, 43,* 491-496.

Handler, J. (1986). *The conditions of discretion.* New York: Russell Sage Foundation.

Hollingshead, A. (1971). *Four factor index of social status.* (Working Paper). Unpublished manuscript, Yale University.

Kirp, D., Buss, W., & Kuriloff, P. (1974). Legal reform of special education: Empirical studies and procedural proposals. *California Law Review, 62,* 40-155.

Kirp, D., & Jensen, D. (1983). What does due process do? *The Public Interest, 73,* 75-90.

Kuriloff, P. (1985). Is justice served by due process?: Affecting the outcome of special education hearings in Pennsylvania. *Journal of Law and Contemporary Problems, 48,* 89-118.

Kuriloff, P. Kirp, D., & Buss, W. (1979). *When handicapped children go to court: Assessing the impact of legal reform of special education in Pennsylvania.* (Project No. Neg. -033-0192, Project on Student Classification and the Law). Washington, DC: National Institute of Education.

Lind, E. A., & Tyler, T. R. (1988). *The social psychology of procedural justice.* New York: Plenum Press.

Little, K., & Shneidman, E. (1959). Congruencies among interpretations of psychological test and anamnestic data. *Psychological Monographs: General and Applied, 73,* (6, Whole No. 476).

Mashaw, J. (1974). The management side of due process: Some theoretical and litigation notes on the assurance of accuracy, fairness and timeliness in the adjudication of social welfare claims. *Cornell Law Review, 59,* 772-824.

Mashaw, J. (1976). The Supreme Court's due process calculus for administrative adjudication in *Mathews v. Eldridge:* Three factors in search of a theory of value. *University of Chicago Law Review, 44,* 28-52.

McDermott, P. (1981). Sources of error in the psychoeducational evaluation of children. *The Journal of School Psychology, 19,* 1, 31-44.

Miller, R. G., Jr. (1966). *Simultaneous statistical inference.* New York: McGraw-Hill.

Neal D., & Kirp, D. (1985). The allure of legalization reconsidered: The case of special education. *Law and Contemporary Problems, 48,* 63-87.

Roth, J., & Roth, A. (Eds.). (1988). *Poetic Justice.* Berkeley, CA: Nolo Press.

Sandifer, M., Hordern, A., Timbury, G. C., & Green L. (1968). Psychiatric diagnosis: A comparative study of North Carolina, London, and Glasgow. *British Journal of Psychiatry, 114,* 1-9.

Sandifer, M., Pettus, C., & Quade, D. (1964). A study of psychiatric diagnosis. *Journal of Nervous and Mental Disorders, 139,* 350-356.

Sheppard, B. (1985). Justice is no simple matter: Case for elaborating our model of procedural fairness. *Journal of Personality and Social Psychology, 49,* 953-962.

Spitzer, R. L., & Fleiss, J. L. (1974). A reanalysis of the reliability of psychiatric diagnosis. *British Journal of Psychiatry, 125,* 341-347.

Spohn, C., Gruhl, J., & Welch, S. (1982). The effect of race on sentencing: A re-examination of an unsettled question. *Law and Society Review, 16,* 71-88.

Thibaut, J., & Walker, L. (1975). *Procedural justice: A psychological analysis.* Hillsdale, NJ:Lawrence Erlbaum.

Tyler, T. (1984). The role of perceived injustice in defendants' evaluation of their courtroom experience. *Law and Society Review, 18,* 51-74.

Zubin, J. (1967). Classification of the behavior disorders. In P.R. Farnworth, O. McNemar, & Q. McNeman (Eds.), *Annual review of psychology, 18,* 373-406.

ABOUT THE AUTHORS

STEVEN S. GOLDBERG is an Associate Professor at Beaver College, Glenside, Pennsylvania. PETER J. KURILOFF is a Professor in the Graduate School of Education at the University of Pennsylvania, Philadelphia.

We wish to express our appreciation to Arthur A. Dole for his thoughtful critique of an earlier draft of this paper. We also thank Paul McDermott, who provided extremely detailed and helpful statistical advice, and William Buss, whose ideas about the way people calculate the relationship of procedures and outcome in determining what is fair were vital in helping us develop our own notions.

Manuscript received April 1987; revision accepted January 1990.

Exceptional Children, Vol. 57, No. 6, pp. 546-555.
©1991 The Council for Exceptional Children.

Section G

INDIVIDUALS WITH DISABILITIES EDUCATION ACT
(I.D.E.A.)

BEST COPY AVAILABLE

H.R. 5

One Hundred Fifth Congress
# of the
United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday,
the seventh day of January, one thousand nine hundred and ninety-seven

An Act

To amend the Individuals with Disabilities Education Act, to reauthorize and make improvements to that Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Individuals with Disabilities Education Act Amendments of 1997".

TITLE I—AMENDMENTS TO THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

SEC. 101. AMENDMENTS TO THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT.

Parts A through D of the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.) are amended to read as follows:

"PART A—GENERAL PROVISIONS

"SEC. 601. SHORT TITLE; TABLE OF CONTENTS; FINDINGS; PURPOSES.

"(a) SHORT TITLE.—This Act may be cited as the 'Individuals with Disabilities Education Act'.

"(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

"PART A—GENERAL PROVISIONS

"Sec. 601. Short title; table of contents; findings; purposes.
"Sec. 602. Definitions.
"Sec. 603. Office of Special Education Programs.
"Sec. 604. Abrogation of State sovereign immunity.
"Sec. 605. Acquisition of equipment; construction or alteration of facilities.
"Sec. 606. Employment of individuals with disabilities.
"Sec. 607. Requirements for prescribing regulations.

"PART B—ASSISTANCE FOR EDUCATION OF ALL CHILDREN WITH DISABILITIES

"Sec. 611. Authorization; allotment; use of funds; authorization of appropriations.
"Sec. 612. State eligibility.
"Sec. 613. Local educational agency eligibility.
"Sec. 614. Evaluations, eligibility determinations, individualized education programs, and educational placements.
"Sec. 615. Procedural safeguards.
"Sec. 616. Withholding and judicial review.
"Sec. 617. Administration.

601(a)-
(b)

BEST COPY AVAILABLE

"Sec. 618. Program information.
"Sec. 619. Preschool grants.

"PART C—INFANTS AND TODDLERS WITH DISABILITIES

"Sec. 631. Findings and policy.
"Sec. 632. Definitions.
"Sec. 633. General authority.
"Sec. 634. Eligibility.
"Sec. 635. Requirements for statewide system.
"Sec. 636. Individualized family service plan.
"Sec. 637. State application and assurances.
"Sec. 638. Uses of funds.
"Sec. 639. Procedural safeguards.
"Sec. 640. Payor of last resort.
"Sec. 641. State Interagency Coordinating Council.
"Sec. 642. Federal administration.
"Sec. 643. Allocation of funds.
"Sec. 644. Federal Interagency Coordinating Council.
"Sec. 645. Authorization of appropriations.

"PART D—NATIONAL ACTIVITIES TO IMPROVE EDUCATION OF CHILDREN WITH DISABILITIES

"SUBPART 1—STATE PROGRAM IMPROVEMENT GRANTS FOR CHILDREN WITH DISABILITIES

"Sec. 651. Findings and purpose.
"Sec. 652. Eligibility and collaborative process.
"Sec. 653. Applications.
"Sec. 654. Use of funds.
"Sec. 655. Minimum State grant amounts.
"Sec. 656. Authorization of appropriations.

"SUBPART 2—COORDINATED RESEARCH, PERSONNEL PREPARATION, TECHNICAL ASSISTANCE, SUPPORT, AND DISSEMINATION OF INFORMATION

"Sec. 661. Administrative provisions.

"CHAPTER 1—IMPROVING EARLY INTERVENTION, EDUCATIONAL, AND TRANSITIONAL SERVICES AND RESULTS FOR CHILDREN WITH DISABILITIES THROUGH COORDINATED RESEARCH AND PERSONNEL PREPARATION

"Sec. 671. Findings and purpose.
"Sec. 672. Research and innovation to improve services and results for children with disabilities.
"Sec. 673. Personnel preparation to improve services and results for children with disabilities.
"Sec. 674. Studies and evaluations.

"CHAPTER 2—IMPROVING EARLY INTERVENTION, EDUCATIONAL, AND TRANSITIONAL SERVICES AND RESULTS FOR CHILDREN WITH DISABILITIES THROUGH COORDINATED TECHNICAL ASSISTANCE, SUPPORT, AND DISSEMINATION OF INFORMATION

"Sec. 681. Findings and purposes.
"Sec. 682. Parent training and information centers.
"Sec. 683. Community parent resource centers.
"Sec. 684. Technical assistance for parent training and information centers.
"Sec. 685. Coordinated technical assistance and dissemination.
"Sec. 686. Authorization of appropriations.
"Sec. 687. Technology development, demonstration, and utilization, and media services.

"(c) FINDINGS.—The Congress finds the following:

"(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

"(2) Before the date of the enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142)—

601(b)-(c)(2)

BEST COPY AVAILABLE

"(A) the special educational needs of children with disabilities were not being fully met;

"(B) more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity;

"(C) 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers;

"(D) there were many children with disabilities throughout the United States participating in regular school programs whose disabilities prevented such children from having a successful educational experience because their disabilities were undetected; and

"(E) because of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

"(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this Act has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

"(4) However, the implementation of this Act has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

"(5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—

"(A) having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible;

"(B) strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

"(C) coordinating this Act with other local, educational service agency, State, and Federal school improvement efforts in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where they are sent;

"(D) providing appropriate special education and related services and aids and supports in the regular classroom to such children, whenever appropriate;

"(E) supporting high-quality, intensive professional development for all personnel who work with such children in order to ensure that they have the skills and knowledge necessary to enable them—

"(i) to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and

"(ii) to be prepared to lead productive, independent, adult lives, to the maximum extent possible;

60(c)(2)(A)-(5)(E)

BEST COPY AVAILABLE

"(F) providing incentives for whole-school approaches and pre-referral intervention to reduce the need to label children as disabled in order to address their learning needs; and

"(G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results.

"(6) While States, local educational agencies, and educational service agencies are responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

"(7)(A) The Federal Government must be responsive to the growing needs of an increasingly more diverse society. A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.

"(B) America's racial profile is rapidly changing. Between 1980 and 1990, the rate of increase in the population for white Americans was 6 percent, while the rate of increase for racial and ethnic minorities was much higher: 53 percent for Hispanics, 13.2 percent for African-Americans, and 107.8 percent for Asians.

"(C) By the year 2000, this Nation will have 275,000,000 people, nearly one of every three of whom will be either African-American, Hispanic, Asian-American, or American Indian.

"(D) Taken together as a group, minority children are comprising an ever larger percentage of public school students. Large-city school populations are overwhelmingly minority, for example: for fall 1993, the figure for Miami was 84 percent; Chicago, 89 percent; Philadelphia, 78 percent; Baltimore, 84 percent; Houston, 88 percent; and Los Angeles, 88 percent.

"(E) Recruitment efforts within special education must focus on bringing larger numbers of minorities into the profession in order to provide appropriate practitioner knowledge, role models, and sufficient manpower to address the clearly changing demography of special education.

"(F) The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation. In the Nation's 2 largest school districts, limited English proficient students make up almost half of all students initially entering school at the kindergarten level. Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education. The Department of Education has found that services provided to limited English proficient students often do not respond primarily to the pupil's academic needs. These trends pose special challenges for special education in the referral, assessment, and services for our Nation's students from non-English language backgrounds.

"(8)(A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.

601(c)(5)(F).
(8)(A)

BEST COPY AVAILABLE

"(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.

"(C) Poor African-American children are 2.3 times more likely to be identified by their teacher as having mental retardation than their white counterpart.

"(D) Although African-Americans represent 16 percent of elementary and secondary enrollments, they constitute 21 percent of total enrollments in special education.

"(E) The drop-out rate is 68 percent higher for minorities than for whites.

"(F) More than 50 percent of minority students in large cities drop out of school.

"(9)(A) The opportunity for full participation in awards for grants and contracts; boards of organizations receiving funds under this Act; and peer review panels; and training of professionals in the area of special education by minority individuals, organizations, and historically black colleges and universities is essential if we are to obtain greater success in the education of minority children with disabilities.

"(B) In 1993, of the 915,000 college and university professors, 4.9 percent were African-American and 2.4 percent were Hispanic. Of the 2,940,000 teachers, prekindergarten through high school, 6.8 percent were African-American and 4.1 percent were Hispanic.

"(C) Students from minority groups comprise more than 50 percent of K–12 public school enrollment in seven States yet minority enrollment in teacher training programs is less than 15 percent in all but six States.

"(D) As the number of African-American and Hispanic students in special education increases, the number of minority teachers and related service personnel produced in our colleges and universities continues to decrease.

"(E) Ten years ago, 12 percent of the United States teaching force in public elementary and secondary schools were members of a minority group. Minorities comprised 21 percent of the national population at that time and were clearly underrepresented then among employed teachers. Today, the elementary and secondary teaching force is 13 percent minority, while one-third of the students in public schools are minority children.

"(F) As recently as 1991, historically black colleges and universities enrolled 44 percent of the African-American teacher trainees in the Nation. However, in 1993, historically black colleges and universities received only 4 percent of the discretionary funds for special education and related services personnel training under this Act.

"(G) While African-American students constitute 28 percent of total enrollment in special education, only 11.2 percent of individuals enrolled in preservice training programs for special education are African-American.

"(H) In 1986–87, of the degrees conferred in education at the B.A., M.A., and Ph.D. levels, only 6, 8, and 8 percent, respectively, were awarded to African-American or Hispanic students.

"(10) Minorities and underserved persons are socially disadvantaged because of the lack of opportunities in training and educational programs, undergirded by the practices in the

601(c)(9)(B)
(10)

private sector that impede their full participation in the mainstream of society.

"(d) PURPOSES.—The purposes of this title are—

"(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;

"(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

"(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

"(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

"(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

"(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

"SEC. 602. DEFINITIONS.

"Except as otherwise provided, as used in this Act:

"(1) ASSISTIVE TECHNOLOGY DEVICE.—The term 'assistive technology device' means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of a child with a disability.

"(2) ASSISTIVE TECHNOLOGY SERVICE.—The term 'assistive technology service' means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. Such term includes—

"(A) the evaluation of the needs of such child, including a functional evaluation of the child in the child's customary environment;

"(B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by such child;

"(C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing of assistive technology devices;

"(D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

"(E) training or technical assistance for such child, or, where appropriate, the family of such child; and

"(F) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of such child.

"(3) CHILD WITH A DISABILITY.—

601(d)-
602(3)

"(A) IN GENERAL.—The term 'child with a disability' means a child—

"(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

"(ii) who, by reason thereof, needs special education and related services.

"(B) CHILD AGED 3 THROUGH 9.—The term 'child with a disability' for a child aged 3 through 9 may, at the discretion of the State and the local educational agency, include a child—

"(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

"(ii) who, by reason thereof, needs special education and related services.

"(4) EDUCATIONAL SERVICE AGENCY.—The term 'educational service agency'—

"(A) means a regional public multiservice agency—

"(i) authorized by State law to develop, manage, and provide services or programs to local educational agencies; and

"(ii) recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary and secondary schools of the State; and

"(B) includes any other public institution or agency having administrative control and direction over a public elementary or secondary school.

"(5) ELEMENTARY SCHOOL.—The term 'elementary school' means a nonprofit institutional day or residential school that provides elementary education, as determined under State law.

"(6) EQUIPMENT.—The term 'equipment' includes—

"(A) machinery, utilities, and built-in equipment and any necessary enclosures or structures to house such machinery, utilities, or equipment; and

"(B) all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture; printed, published, and audio-visual instructional materials; telecommunications, sensory, and other technological aids and devices; and books, periodicals, documents, and other related materials.

"(7) EXCESS COSTS.—The term 'excess costs' means those costs that are in excess of the average annual per-student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting—

"(A) amounts received—

602(3)(A)
(7)(A)

"(i) under part B of this title;

"(ii) under part A of title I of the Elementary and Secondary Education Act of 1965; or

"(iii) under part A of title VII of that Act; and

"(B) any State or local funds expended for programs that would qualify for assistance under any of those parts.

"(8) FREE APPROPRIATE PUBLIC EDUCATION.—The term 'free appropriate public education' means special education and related services that—

"(A) have been provided at public expense, under public supervision and direction, and without charge;

"(B) meet the standards of the State educational agency;

"(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and

"(D) are provided in conformity with the individualized education program required under section 614(d).

"(9) INDIAN.—The term 'Indian' means an individual who is a member of an Indian tribe.

"(10) INDIAN TRIBE.—The term 'Indian tribe' means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaska Native village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act).

"(11) INDIVIDUALIZED EDUCATION PROGRAM.—The term 'individualized education program' or 'IEP' means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 614(d).

"(12) INDIVIDUALIZED FAMILY SERVICE PLAN.—The term 'individualized family service plan' has the meaning given such term in section 636.

"(13) INFANT OR TODDLER WITH A DISABILITY.—The term 'infant or toddler with a disability' has the meaning given such term in section 632.

"(14) INSTITUTION OF HIGHER EDUCATION.—The term 'institution of higher education'—

"(A) has the meaning given that term in section 1201(a) of the Higher Education Act of 1965; and

"(B) also includes any community college receiving funding from the Secretary of the Interior under the Tribally Controlled Community College Assistance Act of 1978.

"(15) LOCAL EDUCATIONAL AGENCY.—

"(A) The term 'local educational agency' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools.

"(B) The term includes—

"(i) an educational service agency, as defined in paragraph (4); and

"(ii) any other public institution or agency having administrative control and direction of a public elementary or secondary school.

602(7)(A)(i)
(15)(B)

"(C) The term includes an elementary or secondary school funded by the Bureau of Indian Affairs, but only to the extent that such inclusion makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the local educational agency receiving assistance under this Act with the smallest student population, except that the school shall not be subject to the jurisdiction of any State educational agency other than the Bureau of Indian Affairs.

"(16) NATIVE LANGUAGE.—The term 'native language', when used with reference to an individual of limited English proficiency, means the language normally used by the individual, or in the case of a child, the language normally used by the parents of the child.

"(17) NONPROFIT.—The term 'nonprofit', as applied to a school, agency, organization, or institution, means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

"(18) OUTLYING AREA.—The term 'outlying area' means the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

"(19) PARENT.—The term 'parent'—

"(A) includes a legal guardian; and

"(B) except as used in sections 615(b)(2) and 639(a)(5), includes an individual assigned under either of those sections to be a surrogate parent.

"(20) PARENT ORGANIZATION.—The term 'parent organization' has the meaning given that term in section 682(g).

"(21) PARENT TRAINING AND INFORMATION CENTER.—The term 'parent training and information center' means a center assisted under section 682 or 683.

"(22) RELATED SERVICES.—The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

"(23) SECONDARY SCHOOL.—The term 'secondary school' means a nonprofit institutional day or residential school that provides secondary education, as determined under State law, except that it does not include any education beyond grade 12.

"(24) SECRETARY.—The term 'Secretary' means the Secretary of Education.

"(25) SPECIAL EDUCATION.—The term 'special education' means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

602(15)(C)
(25)

"(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

"(B) instruction in physical education.

"(26) SPECIFIC LEARNING DISABILITY.—

"(A) IN GENERAL.—The term 'specific learning disability' means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.

"(B) DISORDERS INCLUDED.—Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

"(C) DISORDERS NOT INCLUDED.—Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

"(27) STATE.—The term 'State' means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas.

"(28) STATE EDUCATIONAL AGENCY.—The term 'State educational agency' means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

"(29) SUPPLEMENTARY AIDS AND SERVICES.—The term 'supplementary aids and services' means, aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with section 612(a)(5).

"(30) TRANSITION SERVICES.—The term 'transition services' means a coordinated set of activities for a student with a disability that—

"(A) is designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

"(B) is based upon the individual student's needs, taking into account the student's preferences and interests; and

"(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

"SEC. 603. OFFICE OF SPECIAL EDUCATION PROGRAMS.

"(a) ESTABLISHMENT.—There shall be, within the Office of Special Education and Rehabilitative Services in the Department of Education, an Office of Special Education Programs, which shall

602(25)(A)
603(a)

be the principal agency in such Department for administering and carrying out this Act and other programs and activities concerning the education of children with disabilities.

"(b) DIRECTOR.—The Office established under subsection (a) shall be headed by a Director who shall be selected by the Secretary and shall report directly to the Assistant Secretary for Special Education and Rehabilitative Services.

"(c) VOLUNTARY AND UNCOMPENSATED SERVICES.—Notwithstanding section 1342 of title 31, United States Code, the Secretary is authorized to accept voluntary and uncompensated services in furtherance of the purposes of this Act.

"SEC. 604. ABROGATION OF STATE SOVEREIGN IMMUNITY.

"(a) IN GENERAL.—A State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this Act.

"(b) REMEDIES.—In a suit against a State for a violation of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as those remedies are available for such a violation in the suit against any public entity other than a State.

"(c) EFFECTIVE DATE.—Subsections (a) and (b) apply with respect to violations that occur in whole or part after the date of the enactment of the Education of the Handicapped Act Amendments of 1990.

"SEC. 605. ACQUISITION OF EQUIPMENT; CONSTRUCTION OR ALTERATION OF FACILITIES.

"(a) IN GENERAL.—If the Secretary determines that a program authorized under this Act would be improved by permitting program funds to be used to acquire appropriate equipment, or to construct new facilities or alter existing facilities, the Secretary is authorized to allow the use of those funds for those purposes.

"(b) COMPLIANCE WITH CERTAIN REGULATIONS.—Any construction of new facilities or alteration of existing facilities under subsection (a) shall comply with the requirements of—

"(1) appendix A of part 36 of title 28, Code of Federal Regulations (commonly known as the 'Americans with Disabilities Accessibility Guidelines for Buildings and Facilities'); or

"(2) appendix A of part 101-19.6 of title 41, Code of Federal Regulations (commonly known as the 'Uniform Federal Accessibility Standards').

"SEC. 606. EMPLOYMENT OF INDIVIDUALS WITH DISABILITIES.

"The Secretary shall ensure that each recipient of assistance under this Act makes positive efforts to employ and advance in employment qualified individuals with disabilities in programs assisted under this Act.

"SEC. 607. REQUIREMENTS FOR PRESCRIBING REGULATIONS.

"(a) PUBLIC COMMENT PERIOD.—The Secretary shall provide a public comment period of at least 90 days on any regulation proposed under part B or part C of this Act on which an opportunity for public comment is otherwise required by law.

"(b) PROTECTIONS PROVIDED TO CHILDREN.—The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this Act that would procedurally or substantively lessen the protections provided to children with disabilities under this

603(b)-
607(b)

BEST COPY AVAILABLE

Act, as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluation personnel at individualized education program meetings, or qualifications of personnel), except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation.

"(c) POLICY LETTERS AND STATEMENTS.—The Secretary may not, through policy letters or other statements, establish a rule that is required for compliance with, and eligibility under, this part without following the requirements of section 553 of title 5, United States Code.

"(d) CORRESPONDENCE FROM DEPARTMENT OF EDUCATION DESCRIBING INTERPRETATIONS OF THIS PART.—

"(1) IN GENERAL.—The Secretary shall, on a quarterly basis, publish in the Federal Register, and widely disseminate to interested entities through various additional forms of communication, a list of correspondence from the Department of Education received by individuals during the previous quarter that describes the interpretations of the Department of Education of this Act or the regulations implemented pursuant to this Act.

"(2) ADDITIONAL INFORMATION.—For each item of correspondence published in a list under paragraph (1), the Secretary shall identify the topic addressed by the correspondence and shall include such other summary information as the Secretary determines to be appropriate.

"(e) ISSUES OF NATIONAL SIGNIFICANCE.—If the Secretary receives a written request regarding a policy, question, or interpretation under part B of this Act, and determines that it raises an issue of general interest or applicability of national significance to the implementation of part B, the Secretary shall—

"(1) include a statement to that effect in any written response;

"(2) widely disseminate that response to State educational agencies, local educational agencies, parent and advocacy organizations, and other interested organizations, subject to applicable laws relating to confidentiality of information; and

"(3) not later than one year after the date on which the Secretary responds to the written request, issue written guidance on such policy, question, or interpretation through such means as the Secretary determines to be appropriate and consistent with law, such as a policy memorandum, notice of interpretation, or notice of proposed rulemaking.

"(f) EXPLANATION.—Any written response by the Secretary under subsection (e) regarding a policy, question, or interpretation under part B of this Act shall include an explanation that the written response—

"(1) is provided as informal guidance and is not legally binding; and

"(2) represents the interpretation by the Department of Education of the applicable statutory or regulatory requirements in the context of the specific facts presented.

607(c)-
(f)

BEST COPY AVAILABLE

"PART B—ASSISTANCE FOR EDUCATION OF ALL CHILDREN WITH DISABILITIES

"SEC. 611. AUTHORIZATION; ALLOTMENT; USE OF FUNDS; AUTHORIZATION OF APPROPRIATIONS.

"(a) Grants to States.—

"(1) Purpose of grants.—The Secretary shall make grants to States and the outlying areas, and provide funds to the Secretary of the Interior, to assist them to provide special education and related services to children with disabilities in accordance with this part.

"(2) Maximum amounts.—The maximum amount of the grant a State may receive under this section for any fiscal year is—

"(A) the number of children with disabilities in the State who are receiving special education and related services—

"(i) aged 3 through 5 if the State is eligible for a grant under section 619; and

"(ii) aged 6 through 21; multiplied by

"(B) 40 percent of the average per-pupil expenditure in public elementary and secondary schools in the United States.

"(b) Outlying Areas and Freely Associated States.—

"(1) Funds reserved.—From the amount appropriated for any fiscal year under subsection (j), the Secretary shall reserve not more than one percent, which shall be used—

"(A) to provide assistance to the outlying areas in accordance with their respective populations of individuals aged 3 through 21; and

"(B) for fiscal years 1998 through 2001, to carry out the competition described in paragraph (2), except that the amount reserved to carry out that competition shall not exceed the amount reserved for fiscal year 1996 for the competition under part B of this Act described under the heading "SPECIAL EDUCATION" in Public Law 104–134.

"(2) Limitation for freely associated states.—

"(A) Competitive grants.—The Secretary shall use funds described in paragraph (1)(B) to award grants, on a competitive basis, to Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the freely associated States to carry out the purposes of this part.

"(B) Award basis.—The Secretary shall award grants under subparagraph (A) on a competitive basis, pursuant to the recommendations of the Pacific Region Educational Laboratory in Honolulu, Hawaii. Those recommendations shall be made by experts in the field of special education and related services.

"(C) Assistance requirements.—Any freely associated State that wishes to receive funds under this part shall include, in its application for assistance—

"(i) information demonstrating that it will meet all conditions that apply to States under this part;

611(a)-
(b)(2)(C)(i)

BEST COPY AVAILABLE

"(ii) an assurance that, notwithstanding any other provision of this part, it will use those funds only for the direct provision of special education and related services to children with disabilities and to enhance its capacity to make a free appropriate public education available to all children with disabilities;

"(iii) the identity of the source and amount of funds, in addition to funds under this part, that it will make available to ensure that a free appropriate public education is available to all children with disabilities within its jurisdiction; and

"(iv) such other information and assurances as the Secretary may require.

"(D) TERMINATION OF ELIGIBILITY.—Notwithstanding any other provision of law, the freely associated States shall not receive any funds under this part for any program year that begins after September 30, 2001.

"(E) ADMINISTRATIVE COSTS.—The Secretary may provide not more than five percent of the amount reserved for grants under this paragraph to pay the administrative costs of the Pacific Region Educational Laboratory under subparagraph (B).

"(3) LIMITATION.—An outlying area is not eligible for a competitive award under paragraph (2) unless it receives assistance under paragraph (1)(A).

"(4) SPECIAL RULE.—The provisions of Public Law 95–134, permitting the consolidation of grants by the outlying areas, shall not apply to funds provided to those areas or to the freely associated States under this section.

"(5) ELIGIBILITY FOR DISCRETIONARY PROGRAMS.—The freely associated States shall be eligible to receive assistance under subpart 2 of part D of this Act until September 30, 2001.

"(6) DEFINITION.—As used in this subsection, the term 'freely associated States' means the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

"(c) SECRETARY OF THE INTERIOR.—From the amount appropriated for any fiscal year under subsection (j), the Secretary shall reserve 1.226 percent to provide assistance to the Secretary of the Interior in accordance with subsection (i).

"(d) ALLOCATIONS TO STATES.—

"(1) IN GENERAL.—After reserving funds for studies and evaluations under section 674(e), and for payments to the outlying areas and the Secretary of the Interior under subsections (b) and (c), the Secretary shall allocate the remaining amount among the States in accordance with paragraph (2) or subsection (e), as the case may be.

"(2) INTERIM FORMULA.—Except as provided in subsection (e), the Secretary shall allocate the amount described in paragraph (1) among the States in accordance with section 611(a)(3), (4), and (5) and (b)(1), (2), and (3) of this Act, as in effect prior to the enactment of the Individuals with Disabilities Education Act Amendments of 1997, except that the determination of the number of children with disabilities receiving special education and related services under such section 611(a)(3) may, at the State's discretion, be calculated as of the last

611(b)(2)(C)(ii) -
(d)

BEST COPY AVAILABLE

Friday in October or as of December 1 of the fiscal year for which the funds are appropriated.

"(e) Permanent Formula.—

"(1) Establishment of base year.—The Secretary shall allocate the amount described in subsection (d)(1) among the States in accordance with this subsection for each fiscal year beginning with the first fiscal year for which the amount appropriated under subsection (j) is more than $4,924,672,200.

"(2) Use of base year.—

"(A) Definition.—As used in this subsection, the term 'base year' means the fiscal year preceding the first fiscal year in which this subsection applies.

"(B) Special rule for use of base year amount.—If a State received any funds under this section for the base year on the basis of children aged 3 through 5, but does not make a free appropriate public education available to all children with disabilities aged 3 through 5 in the State in any subsequent fiscal year, the Secretary shall compute the State's base year amount, solely for the purpose of calculating the State's allocation in that subsequent year under paragraph (3) or (4), by subtracting the amount allocated to the State for the base year on the basis of those children.

"(3) Increase in funds.—If the amount available for allocations to States under paragraph (1) is equal to or greater than the amount allocated to the States under this paragraph for the preceding fiscal year, those allocations shall be calculated as follows:

"(A)(i) Except as provided in subparagraph (B), the Secretary shall—

"(I) allocate to each State the amount it received for the base year;

"(II) allocate 85 percent of any remaining funds to States on the basis of their relative populations of children aged 3 through 21 who are of the same age as children with disabilities for whom the State ensures the availability of a free appropriate public education under this part; and

"(III) allocate 15 percent of those remaining funds to States on the basis of their relative populations of children described in subclause (II) who are living in poverty.

"(ii) For the purpose of making grants under this paragraph, the Secretary shall use the most recent population data, including data on children living in poverty, that are available and satisfactory to the Secretary.

"(B) Notwithstanding subparagraph (A), allocations under this paragraph shall be subject to the following:

"(i) No State's allocation shall be less than its allocation for the preceding fiscal year.

"(ii) No State's allocation shall be less than the greatest of—

"(I) the sum of—

"(aa) the amount it received for the base year; and

"(bb) one third of one percent of the amount by which the amount appropriated

611(e)(1)-(3)(B)(ii)

BEST COPY AVAILABLE

under subsection (j) exceeds the amount appropriated under this section for the base year;

"(II) the sum of—

"(aa) the amount it received for the preceding fiscal year; and

"(bb) that amount multiplied by the percentage by which the increase in the funds appropriated from the preceding fiscal year exceeds 1.5 percent; or

"(III) the sum of—

"(aa) the amount it received for the preceding fiscal year; and

"(bb) that amount multiplied by 90 percent of the percentage increase in the amount appropriated from the preceding fiscal year.

"(iii) Notwithstanding clause (ii), no State's allocation under this paragraph shall exceed the sum of—

"(I) the amount it received for the preceding fiscal year; and

"(II) that amount multiplied by the sum of 1.5 percent and the percentage increase in the amount appropriated.

"(C) If the amount available for allocations under this paragraph is insufficient to pay those allocations in full, those allocations shall be ratably reduced, subject to subparagraph (B)(i).

"(4) DECREASE IN FUNDS.—If the amount available for allocations to States under paragraph (1) is less than the amount allocated to the States under this section for the preceding fiscal year, those allocations shall be calculated as follows:

"(A) If the amount available for allocations is greater than the amount allocated to the States for the base year, each State shall be allocated the sum of—

"(i) the amount it received for the base year; and

"(ii) an amount that bears the same relation to any remaining funds as the increase the State received for the preceding fiscal year over the base year bears to the total of all such increases for all States.

"(B)(i) If the amount available for allocations is equal to or less than the amount allocated to the States for the base year, each State shall be allocated the amount it received for the base year.

"(ii) If the amount available is insufficient to make the allocations described in clause (i), those allocations shall be ratably reduced.

"(f) STATE-LEVEL ACTIVITIES.—

"(1) GENERAL.—

"(A) Each State may retain not more than the amount described in subparagraph (B) for administration and other State-level activities in accordance with paragraphs (2) and (3).

"(B) For each fiscal year, the Secretary shall determine and report to the State educational agency an amount that is 25 percent of the amount the State received under this section for fiscal year 1997, cumulatively adjusted by the Secretary for each succeeding fiscal year by the lesser of—

611(e)(3)(B)(ii)(II)
(f)(1)(B)

BEST COPY AVAILABLE

"(i) the percentage increase, if any, from the preceding fiscal year in the State's allocation under this section; or

"(ii) the rate of inflation, as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

"(C) A State may use funds it retains under subparagraph (A) without regard to—

"(i) the prohibition on commingling of funds in section 612(a)(18)(B); and

"(ii) the prohibition on supplanting other funds in section 612(a)(18)(C).

"(2) STATE ADMINISTRATION.—

"(A) For the purpose of administering this part, including section 619 (including the coordination of activities under this part with, and providing technical assistance to, other programs that provide services to children with disabilities)—

"(i) each State may use not more than twenty percent of the maximum amount it may retain under paragraph (1)(A) for any fiscal year or $500,000 (adjusted by the cumulative rate of inflation since fiscal year 1998, as measured by the percentage increase, if any, in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor), whichever is greater; and

"(ii) each outlying area may use up to five percent of the amount it receives under this section for any fiscal year or $35,000, whichever is greater.

"(B) Funds described in subparagraph (A) may also be used for the administration of part C of this Act, if the State educational agency is the lead agency for the State under that part.

"(3) OTHER STATE-LEVEL ACTIVITIES.—Each State shall use any funds it retains under paragraph (1) and does not use for administration under paragraph (2) for any of the following:

"(A) Support and direct services, including technical assistance and personnel development and training.

"(B) Administrative costs of monitoring and complaint investigation, but only to the extent that those costs exceed the costs incurred for those activities during fiscal year 1985.

"(C) To establish and implement the mediation process required by section 615(e), including providing for the costs of mediators and support personnel.

"(D) To assist local educational agencies in meeting personnel shortages.

"(E) To develop a State Improvement Plan under subpart 1 of part D.

"(F) Activities at the State and local levels to meet the performance goals established by the State under section 612(a)(16) and to support implementation of the State Improvement Plan under subpart 1 of part D if the State receives funds under that subpart.

611(f)(1)(B)(i)-
(3)(F)

BEST COPY AVAILABLE

"(G) To supplement other amounts used to develop and implement a Statewide coordinated services system designed to improve results for children and families, including children with disabilities and their families, but not to exceed one percent of the amount received by the State under this section. This system shall be coordinated with and, to the extent appropriate, build on the system of coordinated services developed by the State under part C of this Act.

"(H) For subgrants to local educational agencies for the purposes described in paragraph (4)(A).

"(4)(A) SUBGRANTS TO LOCAL EDUCATIONAL AGENCIES FOR CAPACITY-BUILDING AND IMPROVEMENT.—In any fiscal year in which the percentage increase in the State's allocation under this section exceeds the rate of inflation (as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor), each State shall reserve, from its allocation under this section, the amount described in subparagraph (B) to make subgrants to local educational agencies, unless that amount is less than $100,000, to assist them in providing direct services and in making systemic change to improve results for children with disabilities through one or more of the following:

"(i) Direct services, including alternative programming for children who have been expelled from school, and services for children in correctional facilities, children enrolled in State-operated or State-supported schools, and children in charter schools.

"(ii) Addressing needs or carrying out improvement strategies identified in the State's Improvement Plan under subpart 1 of part D.

"(iii) Adopting promising practices, materials, and technology, based on knowledge derived from education research and other sources.

"(iv) Establishing, expanding, or implementing interagency agreements and arrangements between local educational agencies and other agencies or organizations concerning the provision of services to children with disabilities and their families.

"(v) Increasing cooperative problem-solving between parents and school personnel and promoting the use of alternative dispute resolution.

"(B) MAXIMUM SUBGRANT.—For each fiscal year, the amount referred to in subparagraph (A) is—

"(i) the maximum amount the State was allowed to retain under paragraph (1)(A) for the prior fiscal year, or for fiscal year 1998, 25 percent of the State's allocation for fiscal year 1997 under this section; multiplied by

"(ii) the difference between the percentage increase in the State's allocation under this section and the rate of inflation, as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

611(f)(3)(G) -
(4)

BEST COPY AVAILABLE

"(5) REPORT ON USE OF FUNDS.—As part of the information required to be submitted to the Secretary under section 612, each State shall annually describe—

"(A) how amounts retained under paragraph (1) will be used to meet the requirements of this part;

"(B) how those amounts will be allocated among the activities described in paragraphs (2) and (3) to meet State priorities based on input from local educational agencies; and

"(C) the percentage of those amounts, if any, that will be distributed to local educational agencies by formula.

"(g) SUBGRANTS TO LOCAL EDUCATIONAL AGENCIES.—

"(1) SUBGRANTS REQUIRED.—Each State that receives a grant under this section for any fiscal year shall distribute any funds it does not retain under subsection (f) (at least 75 percent of the grant funds) to local educational agencies in the State that have established their eligibility under section 613, and to State agencies that received funds under section 614A(a) of this Act for fiscal year 1997, as then in effect, and have established their eligibility under section 613, for use in accordance with this part.

"(2) ALLOCATIONS TO LOCAL EDUCATIONAL AGENCIES.—

"(A) INTERIM PROCEDURE.—For each fiscal year for which funds are allocated to States under subsection (d)(2), each State shall allocate funds under paragraph (1) in accordance with section 611(d) of this Act, as in effect prior to the enactment of the Individuals with Disabilities Education Act Amendments of 1997.

"(B) PERMANENT PROCEDURE.—For each fiscal year for which funds are allocated to States under subsection (e), each State shall allocate funds under paragraph (1) as follows:

"(i) BASE PAYMENTS.—The State shall first award each agency described in paragraph (1) the amount that agency would have received under this section for the base year, as defined in subsection (e)(2)(A), if the State had distributed 75 percent of its grant for that year under section 611(d), as then in effect.

"(ii) ALLOCATION OF REMAINING FUNDS.—After making allocations under clause (i), the State shall—

"(I) allocate 85 percent of any remaining funds to those agencies on the basis of the relative numbers of children enrolled in public and private elementary and secondary schools within the agency's jurisdiction; and

"(II) allocate 15 percent of those remaining funds to those agencies in accordance with their relative numbers of children living in poverty, as determined by the State educational agency.

"(3) FORMER CHAPTER 1 STATE AGENCIES.—

"(A) To the extent necessary, the State—

"(i) shall use funds that are available under subsection (f)(1)(A) to ensure that each State agency that received fiscal year 1994 funds under subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 receives, from the combination of funds under subsection (f)(1)(A) and

611(f)(5) -
(g)(3)(A)(i)

BEST COPY AVAILABLE

funds provided under paragraph (1) of this subsection, an amount equal to—

"(I) the number of children with disabilities, aged 6 through 21, to whom the agency was providing special education and related services on December 1 of the fiscal year for which the funds were appropriated, subject to the limitation in subparagraph (B); multiplied by

"(II) the per-child amount provided under such subpart for fiscal year 1994; and

"(ii) may use those funds to ensure that each local educational agency that received fiscal year 1994 funds under that subpart for children who had transferred from a State-operated or State-supported school or program assisted under that subpart receives, from the combination of funds available under subsection (f)(1)(A) and funds provided under paragraph (1) of this subsection, an amount for each such child, aged 3 through 21 to whom the agency was providing special education and related services on December 1 of the fiscal year for which the funds were appropriated, equal to the per-child amount the agency received under that subpart for fiscal year 1994.

"(B) The number of children counted under subparagraph (A)(i)(I) shall not exceed the number of children aged 3 through 21 for whom the agency received fiscal year 1994 funds under subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965.

"(4) REALLOCATION OF FUNDS.—If a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all children with disabilities residing in the area served by that agency with State and local funds, the State educational agency may reallocate any portion of the funds under this part that are not needed by that local agency to provide a free appropriate public education to other local educational agencies in the State that are not adequately providing special education and related services to all children with disabilities residing in the areas they serve.

"(h) DEFINITIONS.—For the purpose of this section—

"(1) the term 'average per-pupil expenditure in public elementary and secondary schools in the United States' means—

"(A) without regard to the source of funds—

"(i) the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the determination is made (or, if satisfactory data for that year are not available, during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the 50 States and the District of Columbia); plus

"(ii) any direct expenditures by the State for the operation of those agencies; divided by

"(B) the aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year; and

611(g)(3)(A)(i)(I)-(h)(1)

"(2) the term 'State' means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

"(i) USE OF AMOUNTS BY SECRETARY OF THE INTERIOR.—

"(1) PROVISION OF AMOUNTS FOR ASSISTANCE.—

"(A) IN GENERAL.—The Secretary of Education shall provide amounts to the Secretary of the Interior to meet the need for assistance for the education of children with disabilities on reservations aged 5 to 21, inclusive, enrolled in elementary and secondary schools for Indian children operated or funded by the Secretary of the Interior. The amount of such payment for any fiscal year shall be equal to 80 percent of the amount allotted under subsection (c) for that fiscal year.

"(B) CALCULATION OF NUMBER OF CHILDREN.—In the case of Indian students aged 3 to 5, inclusive, who are enrolled in programs affiliated with the Bureau of Indian Affairs (hereafter in this subsection referred to as 'BIA') schools and that are required by the States in which such schools are located to attain or maintain State accreditation, and which schools have such accreditation prior to the date of enactment of the Individuals with Disabilities Education Act Amendments of 1991, the school shall be allowed to count those children for the purpose of distribution of the funds provided under this paragraph to the Secretary of the Interior. The Secretary of the Interior shall be responsible for meeting all of the requirements of this part for these children, in accordance with paragraph (2).

"(C) ADDITIONAL REQUIREMENT.—With respect to all other children aged 3 to 21, inclusive, on reservations, the State educational agency shall be responsible for ensuring that all of the requirements of this part are implemented.

"(2) SUBMISSION OF INFORMATION.—The Secretary of Education may provide the Secretary of the Interior amounts under paragraph (1) for a fiscal year only if the Secretary of the Interior submits to the Secretary of Education information that—

"(A) demonstrates that the Department of the Interior meets the appropriate requirements, as determined by the Secretary of Education, of sections 612 (including monitoring and evaluation activities) and 613;

"(B) includes a description of how the Secretary of the Interior will coordinate the provision of services under this part with local educational agencies, tribes and tribal organizations, and other private and Federal service providers;

"(C) includes an assurance that there are public hearings, adequate notice of such hearings, and an opportunity for comment afforded to members of tribes, tribal governing bodies, and affected local school boards before the adoption of the policies, programs, and procedures described in subparagraph (A);

"(D) includes an assurance that the Secretary of the Interior will provide such information as the Secretary of Education may require to comply with section 618;

611(h)(2) -
(i)(2)(D)

EST COPY AVAILABLE

"(E) includes an assurance that the Secretary of the Interior and the Secretary of Health and Human Services have entered into a memorandum of agreement, to be provided to the Secretary of Education, for the coordination of services, resources, and personnel between their respective Federal, State, and local offices and with State and local educational agencies and other entities to facilitate the provision of services to Indian children with disabilities residing on or near reservations (such agreement shall provide for the apportionment of responsibilities and costs including, but not limited to, child find, evaluation, diagnosis, remediation or therapeutic measures, and (where appropriate) equipment and medical or personal supplies as needed for a child to remain in school or a program); and

"(F) includes an assurance that the Department of the Interior will cooperate with the Department of Education in its exercise of monitoring and oversight of this application, and any agreements entered into between the Secretary of the Interior and other entities under this part, and will fulfill its duties under this part.

Section 616(a) shall apply to the information described in this paragraph.

"(3) PAYMENTS FOR EDUCATION AND SERVICES FOR INDIAN CHILDREN WITH DISABILITIES AGED 3 THROUGH 5.—

"(A) IN GENERAL.—With funds appropriated under subsection (j), the Secretary of Education shall make payments to the Secretary of the Interior to be distributed to tribes or tribal organizations (as defined under section 4 of the Indian Self-Determination and Education Assistance Act) or consortia of the above to provide for the coordination of assistance for special education and related services for children with disabilities aged 3 through 5 on reservations served by elementary and secondary schools for Indian children operated or funded by the Department of the Interior. The amount of such payments under subparagraph (B) for any fiscal year shall be equal to 20 percent of the amount allotted under subsection (c).

"(B) DISTRIBUTION OF FUNDS.—The Secretary of the Interior shall distribute the total amount of the payment under subparagraph (A) by allocating to each tribe or tribal organization an amount based on the number of children with disabilities ages 3 through 5 residing on reservations as reported annually, divided by the total of those children served by all tribes or tribal organizations.

"(C) SUBMISSION OF INFORMATION.—To receive a payment under this paragraph, the tribe or tribal organization shall submit such figures to the Secretary of the Interior as required to determine the amounts to be allocated under subparagraph (B). This information shall be compiled and submitted to the Secretary of Education.

"(D) USE OF FUNDS.—The funds received by a tribe or tribal organization shall be used to assist in child find, screening, and other procedures for the early identification of children aged 3 through 5, parent training, and the provision of direct services. These activities may be carried out directly or through contracts or cooperative agreements

611(i)(2)(E) -
(3)(D)

with the BIA, local educational agencies, and other public or private nonprofit organizations. The tribe or tribal organization is encouraged to involve Indian parents in the development and implementation of these activities. The above entities shall, as appropriate, make referrals to local, State, or Federal entities for the provision of services or further diagnosis.

"(E) BIENNIAL REPORT.—To be eligible to receive a grant pursuant to subparagraph (A), the tribe or tribal organization shall provide to the Secretary of the Interior a biennial report of activities undertaken under this paragraph, including the number of contracts and cooperative agreements entered into, the number of children contacted and receiving services for each year, and the estimated number of children needing services during the 2 years following the one in which the report is made. The Secretary of the Interior shall include a summary of this information on a biennial basis in the report to the Secretary of Education required under this subsection. The Secretary of Education may require any additional information from the Secretary of the Interior.

"(F) PROHIBITIONS.—None of the funds allocated under this paragraph may be used by the Secretary of the Interior for administrative purposes, including child count and the provision of technical assistance.

"(4) PLAN FOR COORDINATION OF SERVICES.—The Secretary of the Interior shall develop and implement a plan for the coordination of services for all Indian children with disabilities residing on reservations covered under this Act. Such plan shall provide for the coordination of services benefiting these children from whatever source, including tribes, the Indian Health Service, other BIA divisions, and other Federal agencies. In developing the plan, the Secretary of the Interior shall consult with all interested and involved parties. It shall be based on the needs of the children and the system best suited for meeting those needs, and may involve the establishment of cooperative agreements between the BIA, other Federal agencies, and other entities. The plan shall also be distributed upon request to States, State and local educational agencies, and other agencies providing services to infants, toddlers, and children with disabilities, to tribes, and to other interested parties.

"(5) ESTABLISHMENT OF ADVISORY BOARD.—To meet the requirements of section 612(a)(21), the Secretary of the Interior shall establish, not later than 6 months after the date of the enactment of the Individuals with Disabilities Education Act Amendments of 1997, under the BIA, an advisory board composed of individuals involved in or concerned with the education and provision of services to Indian infants, toddlers, children, and youth with disabilities, including Indians with disabilities, Indian parents or guardians of such children, teachers, service providers, State and local educational officials, representatives of tribes or tribal organizations, representatives from State Interagency Coordinating Councils under section 641 in States having reservations, and other members representing the various divisions and entities of the BIA. The chairperson shall

611(i)(3)(E) -
(5)

BEST COPY AVAILABLE

be selected by the Secretary of the Interior. The advisory board shall—

"(A) assist in the coordination of services within the BIA and with other local, State, and Federal agencies in the provision of education for infants, toddlers, and children with disabilities;

"(B) advise and assist the Secretary of the Interior in the performance of the Secretary's responsibilities described in this subsection;

"(C) develop and recommend policies concerning effective inter- and intra-agency collaboration, including modifications to regulations, and the elimination of barriers to inter- and intra-agency programs and activities;

"(D) provide assistance and disseminate information on best practices, effective program coordination strategies, and recommendations for improved educational programming for Indian infants, toddlers, and children with disabilities; and

"(E) provide assistance in the preparation of information required under paragraph (2)(D).

"(6) ANNUAL REPORTS.—

"(A) IN GENERAL.—The advisory board established under paragraph (5) shall prepare and submit to the Secretary of the Interior and to the Congress an annual report containing a description of the activities of the advisory board for the preceding year.

"(B) AVAILABILITY.—The Secretary of the Interior shall make available to the Secretary of Education the report described in subparagraph (A).

"(j) AUTHORIZATION OF APPROPRIATIONS.—For the purpose of carrying out this part, other than section 619, there are authorized to be appropriated such sums as may be necessary.

"SEC. 612. STATE ELIGIBILITY.

"(a) IN GENERAL.—A State is eligible for assistance under this part for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

"(1) FREE APPROPRIATE PUBLIC EDUCATION.—

"(A) IN GENERAL.—A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

"(B) LIMITATION.—The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children:

"(i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and

"(ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this part be provided to children with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility:

611(i)(5)(A)-
612(a)(1)(B)(ii)

"(I) were not actually identified as being a child with a disability under section 602(3) of this Act; or

"(II) did not have an individualized education program under this part.

"(2) FULL EDUCATIONAL OPPORTUNITY GOAL.—The State has established a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal.

"(3) CHILD FIND.—

"(A) IN GENERAL.—All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

"(B) CONSTRUCTION.—Nothing in this Act requires that children be classified by their disability so long as each child who has a disability listed in section 602 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this part.

"(4) INDIVIDUALIZED EDUCATION PROGRAM.—An individualized education program, or an individualized family service plan that meets the requirements of section 636(d), is developed, reviewed, and revised for each child with a disability in accordance with section 614(d).

"(5) LEAST RESTRICTIVE ENVIRONMENT.—

"(A) IN GENERAL.—To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

"(B) ADDITIONAL REQUIREMENT.—

"(i) IN GENERAL.—If the State uses a funding mechanism by which the State distributes State funds on the basis of the type of setting in which a child is served, the funding mechanism does not result in placements that violate the requirements of subparagraph (A).

"(ii) ASSURANCE.—If the State does not have policies and procedures to ensure compliance with clause (i), the State shall provide the Secretary an assurance that it will revise the funding mechanism as soon as feasible to ensure that such mechanism does not result in such placements.

"(6) PROCEDURAL SAFEGUARDS.—

"(A) IN GENERAL.—Children with disabilities and their parents are afforded the procedural safeguards required by section 615.

612(a)(1)(B)(ii)(I)
(6)(A)

BEST COPY AVAILABLE

"(B) ADDITIONAL PROCEDURAL SAFEGUARDS.—Procedures to ensure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

"(7) EVALUATION.—Children with disabilities are evaluated in accordance with subsections (a) through (c) of section 614.

"(8) CONFIDENTIALITY.—Agencies in the State comply with section 617(c) (relating to the confidentiality of records and information).

"(9) TRANSITION FROM PART C TO PRESCHOOL PROGRAMS.—Children participating in early-intervention programs assisted under part C, and who will participate in preschool programs assisted under this part, experience a smooth and effective transition to those preschool programs in a manner consistent with section 637(a)(8). By the third birthday of such a child, an individualized education program or, if consistent with sections 614(d)(2)(B) and 636(d), an individualized family service plan, has been developed and is being implemented for the child. The local educational agency will participate in transition planning conferences arranged by the designated lead agency under section 637(a)(8).

"(10) CHILDREN IN PRIVATE SCHOOLS.—

"(A) CHILDREN ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS.—

"(i) IN GENERAL.—To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

"(I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part.

"(II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.

"(ii) CHILD-FIND REQUIREMENT.—The requirements of paragraph (3) of this subsection (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including parochial, elementary and secondary schools.

"(B) CHILDREN PLACED IN, OR REFERRED TO, PRIVATE SCHOOLS BY PUBLIC AGENCIES.—

612(a)(6)(B)
(10)(B)

"(i) IN GENERAL.—Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

"(ii) STANDARDS.—In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies.

"(C) PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY.—

"(i) IN GENERAL.—Subject to subparagraph (A), this part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

"(ii) REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT.—If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

"(iii) LIMITATION ON REIMBURSEMENT.—The cost of reimbursement described in clause (ii) may be reduced or denied—

"(I) if—

"(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

"(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the

612(a)(10)(B)(i) -
(C)(iii)(I)

BEST COPY AVAILABLE

public agency of the information described in division (aa);

"(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 615(b)(7), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

"(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

"(iv) EXCEPTION.—Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement may not be reduced or denied for failure to provide such notice if—

"(I) the parent is illiterate and cannot write in English;

"(II) compliance with clause (iii)(I) would likely result in physical or serious emotional harm to the child;

"(III) the school prevented the parent from providing such notice; or

"(IV) the parents had not received notice, pursuant to section 615, of the notice requirement in clause (iii)(I).

"(11) STATE EDUCATIONAL AGENCY RESPONSIBLE FOR GENERAL SUPERVISION.—

"(A) IN GENERAL.—The State educational agency is responsible for ensuring that—

"(i) the requirements of this part are met; and

"(ii) all educational programs for children with disabilities in the State, including all such programs administered by any other State or local agency—

"(I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and

"(II) meet the educational standards of the State educational agency.

"(B) LIMITATION.—Subparagraph (A) shall not limit the responsibility of agencies in the State other than the State educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the State.

"(C) EXCEPTION.—Notwithstanding subparagraphs (A) and (B), the Governor (or another individual pursuant to State law), consistent with State law, may assign to any public agency in the State the responsibility of ensuring that the requirements of this part are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

"(12) OBLIGATIONS RELATED TO AND METHODS OF ENSURING SERVICES.—

"(A) ESTABLISHING RESPONSIBILITY FOR SERVICES.—The Chief Executive Officer or designee of the officer shall

612(a)(10)(C)(iii)(II)
(12)(A)

ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each public agency described in subparagraph (B) and the State educational agency, in order to ensure that all services described in subparagraph (B)(i) that are needed to ensure a free appropriate public education are provided, including the provision of such services during the pendency of any dispute under clause (iii). Such agreement or mechanism shall include the following:

"(i) AGENCY FINANCIAL RESPONSIBILITY.—An identification of, or a method for defining, the financial responsibility of each agency for providing services described in subparagraph (B)(i) to ensure a free appropriate public education to children with disabilities, provided that the financial responsibility of each public agency described in subparagraph (B), including the State Medicaid agency and other public insurers of children with disabilities, shall precede the financial responsibility of the local educational agency (or the State agency responsible for developing the child's IEP).

"(ii) CONDITIONS AND TERMS OF REIMBURSEMENT.—The conditions, terms, and procedures under which a local educational agency shall be reimbursed by other agencies.

"(iii) INTERAGENCY DISPUTES.—Procedures for resolving interagency disputes (including procedures under which local educational agencies may initiate proceedings) under the agreement or other mechanism to secure reimbursement from other agencies or otherwise implement the provisions of the agreement or mechanism.

"(iv) COORDINATION OF SERVICES PROCEDURES.—Policies and procedures for agencies to determine and identify the interagency coordination responsibilities of each agency to promote the coordination and timely and appropriate delivery of services described in subparagraph (B)(i).

"(B) OBLIGATION OF PUBLIC AGENCY.—

"(i) IN GENERAL.—If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsibility under State policy or pursuant to subparagraph (A), to provide or pay for any services that are also considered special education or related services (such as, but not limited to, services described in sections 602(1) relating to assistive technology devices, 602(2) relating to assistive technology services, 602(22) relating to related services, 602(29) relating to supplementary aids and services, and 602(30) relating to transition services) that are necessary for ensuring a free appropriate public education to children with disabilities within the State, such public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement.

"(ii) REIMBURSEMENT FOR SERVICES BY PUBLIC AGENCY.—If a public agency other than an educational

612(a)(12)(A)(i)-
(B)

BEST COPY AVAILABLE

agency fails to provide or pay for the special education and related services described in clause (i), the local educational agency (or State agency responsible for developing the child's IEP) shall provide or pay for such services to the child. Such local educational agency or State agency may then claim reimbursement for the services from the public agency that failed to provide or pay for such services and such public agency shall reimburse the local educational agency or State agency pursuant to the terms of the interagency agreement or other mechanism described in subparagraph (A)(i) according to the procedures established in such agreement pursuant to subparagraph (A)(ii).

"(C) SPECIAL RULE.—The requirements of subparagraph (A) may be met through—

"(i) state statute or regulation;

"(ii) signed agreements between respective agency officials that clearly identify the responsibilities of each agency relating to the provision of services; or

"(iii) other appropriate written methods as determined by the Chief Executive Officer of the State or designee of the officer.

"(13) PROCEDURAL REQUIREMENTS RELATING TO LOCAL EDUCATIONAL AGENCY ELIGIBILITY.—The State educational agency will not make a final determination that a local educational agency is not eligible for assistance under this part without first affording that agency reasonable notice and an opportunity for a hearing.

"(14) COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT.—The State has in effect, consistent with the purposes of this Act and with section 635(a)(8), a comprehensive system of personnel development that is designed to ensure an adequate supply of qualified special education, regular education, and related services personnel that meets the requirements for a State improvement plan relating to personnel development in subsections (b)(2)(B) and (c)(3)(D) of section 653.

"(15) PERSONNEL STANDARDS.—

"(A) IN GENERAL.—The State educational agency has established and maintains standards to ensure that personnel necessary to carry out this part are appropriately and adequately prepared and trained.

"(B) STANDARDS DESCRIBED.—Such standards shall—

"(i) be consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services;

"(ii) to the extent the standards described in subparagraph (A) are not based on the highest requirements in the State applicable to a specific profession or discipline, the State is taking steps to require retraining or hiring of personnel that meet appropriate professional requirements in the State; and

"(iii) allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulations, or written policy,

612(a)(12)(C) -
(15)(B)

1

in meeting the requirements of this part to be used to assist in the provision of special education and related services to children with disabilities under this part.

"(C) POLICY.—In implementing this paragraph, a State may adopt a policy that includes a requirement that local educational agencies in the State make an ongoing good-faith effort to recruit and hire appropriately and adequately trained personnel to provide special education and related services to children with disabilities, including, in a geographic area of the State where there is a shortage of such personnel, the most qualified individuals available who are making satisfactory progress toward completing applicable course work necessary to meet the standards described in subparagraph (B)(i), consistent with State law, and the steps described in subparagraph (B)(ii) within three years.

"(16) PERFORMANCE GOALS AND INDICATORS.—The State—

"(A) has established goals for the performance of children with disabilities in the State that—

"(i) will promote the purposes of this Act, as stated in section 601(d); and

"(ii) are consistent, to the maximum extent appropriate, with other goals and standards for children established by the State;

"(B) has established performance indicators the State will use to assess progress toward achieving those goals that, at a minimum, address the performance of children with disabilities on assessments, drop-out rates, and graduation rates;

"(C) will, every two years, report to the Secretary and the public on the progress of the State, and of children with disabilities in the State, toward meeting the goals established under subparagraph (A); and

"(D) based on its assessment of that progress, will revise its State improvement plan under subpart 1 of part D as may be needed to improve its performance, if the State receives assistance under that subpart.

"(17) PARTICIPATION IN ASSESSMENTS.—

"(A) IN GENERAL.—Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations, where necessary. As appropriate, the State or local educational agency—

"(i) develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs; and

"(ii) develops and, beginning not later than July 1, 2000, conducts those alternate assessments.

"(B) REPORTS.—The State educational agency makes available to the public, and reports to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the following:

"(i) The number of children with disabilities participating in regular assessments.

"(ii) The number of those children participating in alternate assessments.

612(a)(15)(C) -
(17)(B)(ii)

BEST COPY AVAILABLE

“(iii)(I) The performance of those children on regular assessments (beginning not later than July 1, 1998) and on alternate assessments (not later than July 1, 2000), if doing so would be statistically sound and would not result in the disclosure of performance results identifiable to individual children.

“(II) Data relating to the performance of children described under subclause (I) shall be disaggregated—

“(aa) for assessments conducted after July 1, 1998; and

“(bb) for assessments conducted before July 1, 1998, if the State is required to disaggregate such data prior to July 1, 1998.

“(18) SUPPLEMENTATION OF STATE, LOCAL, AND OTHER FEDERAL FUNDS.—

“(A) EXPENDITURES.—Funds paid to a State under this part will be expended in accordance with all the provisions of this part.

“(B) PROHIBITION AGAINST COMMINGLING.—Funds paid to a State under this part will not be commingled with State funds.

“(C) PROHIBITION AGAINST SUPPLANTATION AND CONDITIONS FOR WAIVER BY SECRETARY.—Except as provided in section 613, funds paid to a State under this part will be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this part and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State.

“(19) MAINTENANCE OF STATE FINANCIAL SUPPORT.—

“(A) IN GENERAL.—The State does not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year.

“(B) REDUCTION OF FUNDS FOR FAILURE TO MAINTAIN SUPPORT.—The Secretary shall reduce the allocation of funds under section 611 for any fiscal year following the fiscal year in which the State fails to comply with the requirement of subparagraph (A) by the same amount by which the State fails to meet the requirement.

“(C) WAIVERS FOR EXCEPTIONAL OR UNCONTROLLABLE CIRCUMSTANCES.—The Secretary may waive the requirement of subparagraph (A) for a State, for one fiscal year at a time, if the Secretary determines that—

“(i) granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State; or

612(a)(17)(B)(iii)
(19)(C)(i)

"(ii) the State meets the standard in paragraph (18)(C) of this section for a waiver of the requirement to supplement, and not to supplant, funds received under this part.

"(D) SUBSEQUENT YEARS.—If, for any year, a State fails to meet the requirement of subparagraph (A), including any year for which the State is granted a waiver under subparagraph (C), the financial support required of the State in future years under subparagraph (A) shall be the amount that would have been required in the absence of that failure and not the reduced level of the State's support.

"(E) REGULATIONS.—

"(i) The Secretary shall, by regulation, establish procedures (including objective criteria and consideration of the results of compliance reviews of the State conducted by the Secretary) for determining whether to grant a waiver under subparagraph (C)(ii).

"(ii) The Secretary shall publish proposed regulations under clause (i) not later than 6 months after the date of the enactment of the Individuals with Disabilities Education Act Amendments of 1997, and shall issue final regulations under clause (i) not later than 1 year after such date of enactment.

"(20) PUBLIC PARTICIPATION.—Prior to the adoption of any policies and procedures needed to comply with this section (including any amendments to such policies and procedures), the State ensures that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.

"(21) STATE ADVISORY PANEL.—

"(A) IN GENERAL.—The State has established and maintains an advisory panel for the purpose of providing policy guidance with respect to special education and related services for children with disabilities in the State.

"(B) MEMBERSHIP.—Such advisory panel shall consist of members appointed by the Governor, or any other official authorized under State law to make such appointments, that is representative of the State population and that is composed of individuals involved in, or concerned with, the education of children with disabilities, including—

"(i) parents of children with disabilities;

"(ii) individuals with disabilities;

"(iii) teachers;

"(iv) representatives of institutions of higher education that prepare special education and related services personnel;

"(v) State and local education officials;

"(vi) administrators of programs for children with disabilities;

"(vii) representatives of other State agencies involved in the financing or delivery of related services to children with disabilities;

"(viii) representatives of private schools and public charter schools;

612(a)(19)(C)(ii) -
(21)(B)(viii)

BEST COPY AVAILABLE

“(ix) at least one representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities; and

“(x) representatives from the State juvenile and adult corrections agencies.

“(C) SPECIAL RULE.—A majority of the members of the panel shall be individuals with disabilities or parents of children with disabilities.

“(D) DUTIES.—The advisory panel shall—

“(i) advise the State educational agency of unmet needs within the State in the education of children with disabilities;

“(ii) comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities;

“(iii) advise the State educational agency in developing evaluations and reporting on data to the Secretary under section 618;

“(iv) advise the State educational agency in developing corrective action plans to address findings identified in Federal monitoring reports under this part; and

“(v) advise the State educational agency in developing and implementing policies relating to the coordination of services for children with disabilities.

“(22) SUSPENSION AND EXPULSION RATES.—

“(A) IN GENERAL.—The State educational agency examines data to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities—

“(i) among local educational agencies in the State; or

“(ii) compared to such rates for nondisabled children within such agencies.

“(B) REVIEW AND REVISION OF POLICIES.—If such discrepancies are occurring, the State educational agency reviews and, if appropriate, revises (or requires the affected State or local educational agency to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of behavioral interventions, and procedural safeguards, to ensure that such policies, procedures, and practices comply with this Act.

“(b) STATE EDUCATIONAL AGENCY AS PROVIDER OF FREE APPROPRIATE PUBLIC EDUCATION OR DIRECT SERVICES.—If the State educational agency provides free appropriate public education to children with disabilities, or provides direct services to such children, such agency—

“(1) shall comply with any additional requirements of section 613(a), as if such agency were a local educational agency; and

“(2) may use amounts that are otherwise available to such agency under this part to serve those children without regard to section 613(a)(2)(A)(i) (relating to excess costs).

“(c) EXCEPTION FOR PRIOR STATE PLANS.—

“(1) IN GENERAL.—If a State has on file with the Secretary policies and procedures that demonstrate that such State meets

612(a)(21)(B)(ix)
(c)(1)

any requirement of subsection (a), including any policies and procedures filed under this part as in effect before the effective date of the Individuals with Disabilities Education Act Amendments of 1997, the Secretary shall consider such State to have met such requirement for purposes of receiving a grant under this part.

"(2) Modifications made by State.—Subject to paragraph (3), an application submitted by a State in accordance with this section shall remain in effect until the State submits to the Secretary such modifications as the State deems necessary. This section shall apply to a modification to an application to the same extent and in the same manner as this section applies to the original plan.

"(3) Modifications required by the Secretary.—If, after the effective date of the Individuals with Disabilities Education Act Amendments of 1997, the provisions of this Act are amended (or the regulations developed to carry out this Act are amended), or there is a new interpretation of this Act by a Federal court or a State's highest court, or there is an official finding of noncompliance with Federal law or regulations, the Secretary may require a State to modify its application only to the extent necessary to ensure the State's compliance with this part.

"(d) Approval by the Secretary.—

"(1) In general.—If the Secretary determines that a State is eligible to receive a grant under this part, the Secretary shall notify the State of that determination.

"(2) Notice and hearing.—The Secretary shall not make a final determination that a State is not eligible to receive a grant under this part until after providing the State—

"(A) with reasonable notice; and

"(B) with an opportunity for a hearing.

"(e) Assistance Under Other Federal Programs.—Nothing in this title permits a State to reduce medical and other assistance available, or to alter eligibility, under titles V and XIX of the Social Security Act with respect to the provision of a free appropriate public education for children with disabilities in the State.

"(f) By-Pass for Children in Private Schools.—

"(1) In general.—If, on the date of enactment of the Education of the Handicapped Act Amendments of 1983, a State educational agency is prohibited by law from providing for the participation in special programs of children with disabilities enrolled in private elementary and secondary schools as required by subsection (a)(10)(A), the Secretary shall, notwithstanding such provision of law, arrange for the provision of services to such children through arrangements which shall be subject to the requirements of such subsection.

"(2) Payments.—

"(A) Determination of amounts.—If the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services for a fiscal year an amount per child that does not exceed the amount determined by dividing—

"(i) the total amount received by the State under this part for such fiscal year; by

612(c)(2) -
- (f)(2)(A)(i)

EST COPY AVAILABLE

“(ii) the number of children with disabilities served in the prior year, as reported to the Secretary by the State under section 618.

“(B) WITHHOLDING OF CERTAIN AMOUNTS.—Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount the Secretary estimates would be necessary to pay the cost of services described in subparagraph (A).

“(C) PERIOD OF PAYMENTS.—The period under which payments are made under subparagraph (A) shall continue until the Secretary determines that there will no longer be any failure or inability on the part of the State educational agency to meet the requirements of subsection (a)(10)(A).

“(3) NOTICE AND HEARING.—

“(A) IN GENERAL.—The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for at least 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or the Secretary's designee to show cause why such action should not be taken.

“(B) REVIEW OF ACTION.—If a State educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A), such agency may, not later than 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based the Secretary's action, as provided in section 2112 of title 28, United States Code.

“(C) REVIEW OF FINDINGS OF FACT.—The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

“(D) JURISDICTION OF COURT OF APPEALS; REVIEW BY UNITED STATES SUPREME COURT.—Upon the filing of a petition under subparagraph (B), the United States court of appeals shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

612(f)(2)(A)(ii)-
(3)(D)

"SEC. 613. LOCAL EDUCATIONAL AGENCY ELIGIBILITY.

"(a) In General.—A local educational agency is eligible for assistance under this part for a fiscal year if such agency demonstrates to the satisfaction of the State educational agency that it meets each of the following conditions:

"(1) Consistency with State policies.—The local educational agency, in providing for the education of children with disabilities within its jurisdiction, has in effect policies, procedures, and programs that are consistent with the State policies and procedures established under section 612.

"(2) Use of amounts.—

"(A) In general.—Amounts provided to the local educational agency under this part shall be expended in accordance with the applicable provisions of this part and—

"(i) shall be used only to pay the excess costs of providing special education and related services to children with disabilities;

"(ii) shall be used to supplement State, local, and other Federal funds and not to supplant such funds; and

"(iii) shall not be used, except as provided in subparagraphs (B) and (C), to reduce the level of expenditures for the education of children with disabilities made by the local educational agency from local funds below the level of those expenditures for the preceding fiscal year.

"(B) Exception.—Notwithstanding the restriction in subparagraph (A)(iii), a local educational agency may reduce the level of expenditures where such reduction is attributable to—

"(i) the voluntary departure, by retirement or otherwise, or departure for just cause, of special education personnel;

"(ii) a decrease in the enrollment of children with disabilities;

"(iii) the termination of the obligation of the agency, consistent with this part, to provide a program of special education to a particular child with a disability that is an exceptionally costly program, as determined by the State educational agency, because the child—

"(I) has left the jurisdiction of the agency;

"(II) has reached the age at which the obligation of the agency to provide a free appropriate public education to the child has terminated; or

"(III) no longer needs such program of special education; or

"(iv) the termination of costly expenditures for long-term purchases, such as the acquisition of equipment or the construction of school facilities.

"(C) Treatment of Federal funds in certain fiscal years.—

"(i) Notwithstanding clauses (ii) and (iii) of subparagraph (A), for any fiscal year for which amounts appropriated to carry out section 611 exceeds $4,100,000,000, a local educational agency may treat as local funds, for the purpose of such clauses, up

613(a)(1)-
(2)(C)(i

to 20 percent of the amount of funds it receives under this part that exceeds the amount it received under this part for the previous fiscal year.

"(ii) Notwithstanding clause (i), if a State educational agency determines that a local educational agency is not meeting the requirements of this part, the State educational agency may prohibit the local educational agency from treating funds received under this part as local funds under clause (i) for any fiscal year, only if it is authorized to do so by the State constitution or a State statute.

"(D) SCHOOLWIDE PROGRAMS UNDER TITLE I OF THE ESEA.—Notwithstanding subparagraph (A) or any other provision of this part, a local educational agency may use funds received under this part for any fiscal year to carry out a schoolwide program under section 1114 of the Elementary and Secondary Education Act of 1965, except that the amount so used in any such program shall not exceed—

"(i) the number of children with disabilities participating in the schoolwide program; multiplied by

"(ii)(I) the amount received by the local educational agency under this part for that fiscal year; divided by

"(II) the number of children with disabilities in the jurisdiction of that agency.

"(3) PERSONNEL DEVELOPMENT.—The local educational agency—

"(A) shall ensure that all personnel necessary to carry out this part are appropriately and adequately prepared, consistent with the requirements of section 653(c)(3)(D); and

"(B) to the extent such agency determines appropriate, shall contribute to and use the comprehensive system of personnel development of the State established under section 612(a)(14).

"(4) PERMISSIVE USE OF FUNDS.—Notwithstanding paragraph (2)(A) or section 612(a)(18)(B) (relating to commingled funds), funds provided to the local educational agency under this part may be used for the following activities:

"(A) SERVICES AND AIDS THAT ALSO BENEFIT NONDISABLED CHILDREN.—For the costs of special education and related services and supplementary aids and services provided in a regular class or other education-related setting to a child with a disability in accordance with the individualized education program of the child, even if one or more nondisabled children benefit from such services.

"(B) INTEGRATED AND COORDINATED SERVICES SYSTEM.—To develop and implement a fully integrated and coordinated services system in accordance with subsection (f).

"(5) TREATMENT OF CHARTER SCHOOLS AND THEIR STUDENTS.—In carrying out this part with respect to charter schools that are public schools of the local educational agency, the local educational agency—

613(a)(2)(C)(ii)
(5)

"(A) serves children with disabilities attending those schools in the same manner as it serves children with disabilities in its other schools; and

"(B) provides funds under this part to those schools in the same manner as it provides those funds to its other schools.

"(6) INFORMATION FOR STATE EDUCATIONAL AGENCY.—The local educational agency shall provide the State educational agency with information necessary to enable the State educational agency to carry out its duties under this part, including, with respect to paragraphs (16) and (17) of section 612(a), information relating to the performance of children with disabilities participating in programs carried out under this part.

"(7) PUBLIC INFORMATION.—The local educational agency shall make available to parents of children with disabilities and to the general public all documents relating to the eligibility of such agency under this part.

"(b) EXCEPTION FOR PRIOR LOCAL PLANS.—

"(1) IN GENERAL.—If a local educational agency or State agency has on file with the State educational agency policies and procedures that demonstrate that such local educational agency, or such State agency, as the case may be, meets any requirement of subsection (a), including any policies and procedures filed under this part as in effect before the effective date of the Individuals with Disabilities Education Act Amendments of 1997, the State educational agency shall consider such local educational agency or State agency, as the case may be, to have met such requirement for purposes of receiving assistance under this part.

"(2) MODIFICATION MADE BY LOCAL EDUCATIONAL AGENCY.—Subject to paragraph (3), an application submitted by a local educational agency in accordance with this section shall remain in effect until it submits to the State educational agency such modifications as the local educational agency deems necessary.

"(3) MODIFICATIONS REQUIRED BY STATE EDUCATIONAL AGENCY.—If, after the effective date of the Individuals with Disabilities Education Act Amendments of 1997, the provisions of this Act are amended (or the regulations developed to carry out this Act are amended), or there is a new interpretation of this Act by Federal or State courts, or there is an official finding of noncompliance with Federal or State law or regulations, the State educational agency may require a local educational agency to modify its application only to the extent necessary to ensure the local educational agency's compliance with this part or State law.

"(c) NOTIFICATION OF LOCAL EDUCATIONAL AGENCY OR STATE AGENCY IN CASE OF INELIGIBILITY.—If the State educational agency determines that a local educational agency or State agency is not eligible under this section, the State educational agency shall notify the local educational agency or State agency, as the case may be, of that determination and shall provide such local educational agency or State agency with reasonable notice and an opportunity for a hearing.

"(d) LOCAL EDUCATIONAL AGENCY COMPLIANCE.—

"(1) IN GENERAL.—If the State educational agency, after reasonable notice and an opportunity for a hearing, finds that

613(a)(5)(A) -
(d)(1)

a local educational agency or State agency that has been determined to be eligible under this section is failing to comply with any requirement described in subsection (a), the State educational agency shall reduce or shall not provide any further payments to the local educational agency or State agency until the State educational agency is satisfied that the local educational agency or State agency, as the case may be, is complying with that requirement.

"(2) ADDITIONAL REQUIREMENT.—Any State agency or local educational agency in receipt of a notice described in paragraph (1) shall, by means of public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency.

"(3) CONSIDERATION.—In carrying out its responsibilities under paragraph (1), the State educational agency shall consider any decision made in a hearing held under section 615 that is adverse to the local educational agency or State agency involved in that decision.

"(e) JOINT ESTABLISHMENT OF ELIGIBILITY.—

"(1) JOINT ESTABLISHMENT.—

"(A) IN GENERAL.—A State educational agency may require a local educational agency to establish its eligibility jointly with another local educational agency if the State educational agency determines that the local educational agency would be ineligible under this section because the local educational agency would not be able to establish and maintain programs of sufficient size and scope to effectively meet the needs of children with disabilities.

"(B) CHARTER SCHOOL EXCEPTION.—A State educational agency may not require a charter school that is a local educational agency to jointly establish its eligibility under subparagraph (A) unless it is explicitly permitted to do so under the State's charter school statute.

"(2) AMOUNT OF PAYMENTS.—If a State educational agency requires the joint establishment of eligibility under paragraph (1), the total amount of funds made available to the affected local educational agencies shall be equal to the sum of the payments that each such local educational agency would have received under section 611(g) if such agencies were eligible for such payments.

"(3) REQUIREMENTS.—Local educational agencies that establish joint eligibility under this subsection shall—

"(A) adopt policies and procedures that are consistent with the State's policies and procedures under section 612(a); and

"(B) be jointly responsible for implementing programs that receive assistance under this part.

"(4) REQUIREMENTS FOR EDUCATIONAL SERVICE AGENCIES.—

"(A) IN GENERAL.—If an educational service agency is required by State law to carry out programs under this part, the joint responsibilities given to local educational agencies under this subsection shall—

"(i) not apply to the administration and disbursement of any payments received by that educational service agency; and

613(d)(2) -
(4)(A)(i)

"(ii) be carried out only by that educational service agency.

"(B) Additional requirement.—Notwithstanding any other provision of this subsection, an educational service agency shall provide for the education of children with disabilities in the least restrictive environment, as required by section 612(a)(5).

"(f) Coordinated Services System.—

"(1) In general.—A local educational agency may not use more than 5 percent of the amount such agency receives under this part for any fiscal year, in combination with other amounts (which shall include amounts other than education funds), to develop and implement a coordinated services system designed to improve results for children and families, including children with disabilities and their families.

"(2) Activities.—In implementing a coordinated services system under this subsection, a local educational agency may carry out activities that include—

"(A) improving the effectiveness and efficiency of service delivery, including developing strategies that promote accountability for results;

"(B) service coordination and case management that facilitates the linkage of individualized education programs under this part and individualized family service plans under part C with individualized service plans under multiple Federal and State programs, such as title I of the Rehabilitation Act of 1973 (vocational rehabilitation), title XIX of the Social Security Act (Medicaid), and title XVI of the Social Security Act (supplemental security income);

"(C) developing and implementing interagency financing strategies for the provision of education, health, mental health, and social services, including transition services and related services under this Act; and

"(D) interagency personnel development for individuals working on coordinated services.

"(3) Coordination with certain projects under Elementary and Secondary Education Act of 1965.—If a local educational agency is carrying out a coordinated services project under title XI of the Elementary and Secondary Education Act of 1965 and a coordinated services project under this part in the same schools, such agency shall use amounts under this subsection in accordance with the requirements of that title.

"(g) School-Based Improvement Plan.—

"(1) In general.—Each local educational agency may, in accordance with paragraph (2), use funds made available under this part to permit a public school within the jurisdiction of the local educational agency to design, implement, and evaluate a school-based improvement plan that is consistent with the purposes described in section 651(b) and that is designed to improve educational and transitional results for all children with disabilities and, as appropriate, for other children consistent with subparagraphs (A) and (B) of subsection (a)(4) in that public school.

"(2) Authority.—

"(A) In general.—A State educational agency may grant authority to a local educational agency to permit

613(d)(4)(A)(ii)-
(g)(2)(A)

BEST COPY AVAILABLE

a public school described in paragraph (1) (through a school-based standing panel established under paragraph (4)(B)) to design, implement, and evaluate a school-based improvement plan described in paragraph (1) for a period not to exceed 3 years.

“(B) RESPONSIBILITY OF LOCAL EDUCATIONAL AGENCY.—If a State educational agency grants the authority described in subparagraph (A), a local educational agency that is granted such authority shall have the sole responsibility of oversight of all activities relating to the design, implementation, and evaluation of any school-based improvement plan that a public school is permitted to design under this subsection.

“(3) PLAN REQUIREMENTS.—A school-based improvement plan described in paragraph (1) shall—

“(A) be designed to be consistent with the purposes described in section 651(b) and to improve educational and transitional results for all children with disabilities and, as appropriate, for other children consistent with subparagraphs (A) and (B) of subsection (a)(4), who attend the school for which the plan is designed and implemented;

“(B) be designed, evaluated, and, as appropriate, implemented by a school-based standing panel established in accordance with paragraph (4)(B);

“(C) include goals and measurable indicators to assess the progress of the public school in meeting such goals; and

“(D) ensure that all children with disabilities receive the services described in the individualized education programs of such children.

“(4) RESPONSIBILITIES OF THE LOCAL EDUCATIONAL AGENCY.—A local educational agency that is granted authority under paragraph (2) to permit a public school to design, implement, and evaluate a school-based improvement plan shall—

“(A) select each school under the jurisdiction of such agency that is eligible to design, implement, and evaluate such a plan;

“(B) require each school selected under subparagraph (A), in accordance with criteria established by such local educational agency under subparagraph (C), to establish a school-based standing panel to carry out the duties described in paragraph (3)(B);

“(C) establish—

“(i) criteria that shall be used by such local educational agency in the selection of an eligible school under subparagraph (A);

“(ii) criteria that shall be used by a public school selected under subparagraph (A) in the establishment of a school-based standing panel to carry out the duties described in paragraph (3)(B) and that shall ensure that the membership of such panel reflects the diversity of the community in which the public school is located and includes, at a minimum—

“(I) parents of children with disabilities who attend such public school, including parents of

613(g)(2)(B)-
(4)(C)(ii)(I)

children with disabilities from unserved and underserved populations, as appropriate;

“(II) special education and general education teachers of such public school;

“(III) special education and general education administrators, or the designee of such administrators, of such public school; and

“(IV) related services providers who are responsible for providing services to the children with disabilities who attend such public school; and

“(iii) criteria that shall be used by such local educational agency with respect to the distribution of funds under this part to carry out this subsection;

“(D) disseminate the criteria established under subparagraph (C) to local school district personnel and local parent organizations within the jurisdiction of such local educational agency;

“(E) require a public school that desires to design, implement, and evaluate a school-based improvement plan to submit an application at such time, in such manner, and accompanied by such information as such local educational agency shall reasonably require; and

“(F) establish procedures for approval by such local educational agency of a school-based improvement plan designed under this subsection.

“(5) LIMITATION.—A school-based improvement plan described in paragraph (1) may be submitted to a local educational agency for approval only if a consensus with respect to any matter relating to the design, implementation, or evaluation of the goals of such plan is reached by the school-based standing panel that designed such plan.

“(6) ADDITIONAL REQUIREMENTS.—

“(A) PARENTAL INVOLVEMENT.—In carrying out the requirements of this subsection, a local educational agency shall ensure that the parents of children with disabilities are involved in the design, evaluation, and, where appropriate, implementation of school-based improvement plans in accordance with this subsection.

“(B) PLAN APPROVAL.—A local educational agency may approve a school-based improvement plan of a public school within the jurisdiction of such agency for a period of 3 years, if—

“(i) the approval is consistent with the policies, procedures, and practices established by such local educational agency and in accordance with this subsection; and

“(ii) a majority of parents of children who are members of the school-based standing panel, and a majority of other members of the school-based standing panel, that designed such plan agree in writing to such plan.

“(7) EXTENSION OF PLAN.—If a public school within the jurisdiction of a local educational agency meets the applicable requirements and criteria described in paragraphs (3) and (4) at the expiration of the 3-year approval period described in

613(g)(4)(C)(ii)(II)
(7)

BEST COPY AVAILABLE

paragraph (6)(B), such agency may approve a school-based improvement plan of such school for an additional 3-year period.

“(h) Direct Services by the State Educational Agency.—

“(1) In general.—A State educational agency shall use the payments that would otherwise have been available to a local educational agency or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that local agency, or for whom that State agency is responsible, if the State educational agency determines that the local education agency or State agency, as the case may be—

“(A) has not provided the information needed to establish the eligibility of such agency under this section;

“(B) is unable to establish and maintain programs of free appropriate public education that meet the requirements of subsection (a);

“(C) is unable or unwilling to be consolidated with one or more local educational agencies in order to establish and maintain such programs; or

“(D) has one or more children with disabilities who can best be served by a regional or State program or service-delivery system designed to meet the needs of such children.

“(2) Manner and location of education and services.—The State educational agency may provide special education and related services under paragraph (1) in such manner and at such locations (including regional or State centers) as the State agency considers appropriate. Such education and services shall be provided in accordance with this part.

“(i) State Agency Eligibility.—Any State agency that desires to receive a subgrant for any fiscal year under section 611(g) shall demonstrate to the satisfaction of the State educational agency that—

“(1) all children with disabilities who are participating in programs and projects funded under this part receive a free appropriate public education, and that those children and their parents are provided all the rights and procedural safeguards described in this part; and

“(2) the agency meets such other conditions of this section as the Secretary determines to be appropriate.

“(j) Disciplinary Information.—The State may require that a local educational agency include in the records of a child with a disability a statement of any current or previous disciplinary action that has been taken against the child and transmit such statement to the same extent that such disciplinary information is included in, and transmitted with, the student records of nondisabled children. The statement may include a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child. If the State adopts such a policy, and the child transfers from one school to another, the transmission of any of the child's records must include both the child's current individualized education program and any such statement of current or previous disciplinary action that has been taken against the child.

613(h)-
(j)

"SEC. 614. EVALUATIONS, ELIGIBILITY DETERMINATIONS, INDIVIDUALIZED EDUCATION PROGRAMS, AND EDUCATIONAL PLACEMENTS.

"(a) Evaluations and Reevaluations.—

"(1) Initial evaluations.—

"(A) In general.—A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation, in accordance with this paragraph and subsection (b), before the initial provision of special education and related services to a child with a disability under this part.

"(B) Procedures.—Such initial evaluation shall consist of procedures—

"(i) to determine whether a child is a child with a disability (as defined in section 602(3)); and

"(ii) to determine the educational needs of such child.

"(C) Parental consent.—

"(i) In general.—The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in section 602(3)(A) or 602(3)(B) shall obtain an informed consent from the parent of such child before the evaluation is conducted. Parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services.

"(ii) Refusal.—If the parents of such child refuse consent for the evaluation, the agency may continue to pursue an evaluation by utilizing the mediation and due process procedures under section 615, except to the extent inconsistent with State law relating to parental consent.

"(2) Reevaluations.—A local educational agency shall ensure that a reevaluation of each child with a disability is conducted—

"(A) if conditions warrant a reevaluation or if the child's parent or teacher requests a reevaluation, but at least once every 3 years; and

"(B) in accordance with subsections (b) and (c).

"(b) Evaluation Procedures.—

"(1) Notice.—The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 615, that describes any evaluation procedures such agency proposes to conduct.

"(2) Conduct of evaluation.—In conducting the evaluation, the local educational agency shall—

"(A) use a variety of assessment tools and strategies to gather relevant functional and developmental information, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general curriculum or, for preschool children, to participate in appropriate activities;

614(a)-
(b)(2)(A)

BEST COPY AVAILABLE

"(B) not use any single procedure as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

"(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

"(3) ADDITIONAL REQUIREMENTS.—Each local educational agency shall ensure that—

"(A) tests and other evaluation materials used to assess a child under this section—

"(i) are selected and administered so as not to be discriminatory on a racial or cultural basis; and

"(ii) are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so; and

"(B) any standardized tests that are given to the child—

"(i) have been validated for the specific purpose for which they are used;

"(ii) are administered by trained and knowledgeable personnel; and

"(iii) are administered in accordance with any instructions provided by the producer of such tests;

"(C) the child is assessed in all areas of suspected disability; and

"(D) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

"(4) DETERMINATION OF ELIGIBILITY.—Upon completion of administration of tests and other evaluation materials—

"(A) the determination of whether the child is a child with a disability as defined in section 602(3) shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and

"(B) a copy of the evaluation report and the documentation of determination of eligibility will be given to the parent.

"(5) SPECIAL RULE FOR ELIGIBILITY DETERMINATION.—In making a determination of eligibility under paragraph (4)(A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is lack of instruction in reading or math or limited English proficiency.

"(c) ADDITIONAL REQUIREMENTS FOR EVALUATION AND REEVALUATIONS.—

"(1) REVIEW OF EXISTING EVALUATION DATA.—As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team described in subsection (d)(1)(B) and other qualified professionals, as appropriate, shall—

"(A) review existing evaluation data on the child, including evaluations and information provided by the parents of the child, current classroom-based assessments and observations, and teacher and related services providers observation; and

"(B) on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine—

614(b)(2)(B)-
(c)(1)(B)

"(i) whether the child has a particular category of disability, as described in section 602(3), or, in case of a reevaluation of a child, whether the child continues to have such a disability;

"(ii) the present levels of performance and educational needs of the child;

"(iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

"(iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general curriculum.

"(2) Source of data.—The local educational agency shall administer such tests and other evaluation materials as may be needed to produce the data identified by the IEP Team under paragraph (1)(B).

"(3) Parental consent.—Each local educational agency shall obtain informed parental consent, in accordance with subsection (a)(1)(C), prior to conducting any reevaluation of a child with a disability, except that such informed parent consent need not be obtained if the local educational agency can demonstrate that it had taken reasonable measures to obtain such consent and the child's parent has failed to respond.

"(4) Requirements if additional data are not needed.—If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, the local educational agency—

"(A) shall notify the child's parents of—

"(i) that determination and the reasons for it; and

"(ii) the right of such parents to request an assessment to determine whether the child continues to be a child with a disability; and

"(B) shall not be required to conduct such an assessment unless requested to by the child's parents.

"(5) Evaluations before change in eligibility.—A local educational agency shall evaluate a child with a disability in accordance with this section before determining that the child is no longer a child with a disability.

"(d) Individualized Education Programs.—

"(1) Definitions.—As used in this title:

"(A) Individualized education program.—The term 'individualized education program' or 'IEP' means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

"(i) a statement of the child's present levels of educational performance, including—

"(I) how the child's disability affects the child's involvement and progress in the general curriculum; or

614(c)(1)(B)(i) -
(d)(1)(A)(i)(I)

BEST COPY AVAILABLE

"(II) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

"(ii) a statement of measurable annual goals, including benchmarks or short-term objectives, related to—

"(I) meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and

"(II) meeting each of the child's other educational needs that result from the child's disability;

"(iii) a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

"(I) to advance appropriately toward attaining the annual goals;

"(II) to be involved and progress in the general curriculum in accordance with clause (i) and to participate in extracurricular and other nonacademic activities; and

"(III) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this paragraph;

"(iv) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in clause (iii);

"(v)(I) a statement of any individual modifications in the administration of State or districtwide assessments of student achievement that are needed in order for the child to participate in such assessment; and

"(II) if the IEP Team determines that the child will not participate in a particular State or districtwide assessment of student achievement (or part of such an assessment), a statement of—

"(aa) why that assessment is not appropriate for the child; and

"(bb) how the child will be assessed;

"(vi) the projected date for the beginning of the services and modifications described in clause (iii), and the anticipated frequency, location, and duration of those services and modifications;

"(vii)(I) beginning at age 14, and updated annually, a statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's courses of study (such as participation in advanced-placement courses or a vocational education program);

"(II) beginning at age 16 (or younger, if determined appropriate by the IEP Team), a statement of needed

614(d)(1)(A)(i)(II)
(vii)(II)

transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages; and

"(III) beginning at least one year before the child reaches the age of majority under State law, a statement that the child has been informed of his or her rights under this title, if any, that will transfer to the child on reaching the age of majority under section 615(m); and

"(viii) a statement of—

"(I) how the child's progress toward the annual goals described in clause (ii) will be measured; and

"(II) how the child's parents will be regularly informed (by such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of—

"(aa) their child's progress toward the annual goals described in clause (ii); and

"(bb) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

"(B) INDIVIDUALIZED EDUCATION PROGRAM TEAM.—The term 'individualized education program team' or 'IEP Team' means a group of individuals composed of—

"(i) the parents of a child with a disability;

"(ii) at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

"(iii) at least one special education teacher, or where appropriate, at least one special education provider of such child;

"(iv) a representative of the local educational agency who—

"(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

"(II) is knowledgeable about the general curriculum; and

"(III) is knowledgeable about the availability of resources of the local educational agency;

"(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

"(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

"(vii) whenever appropriate, the child with a disability.

"(2) REQUIREMENT THAT PROGRAM BE IN EFFECT.—

"(A) IN GENERAL.—At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall

614(d)(1)(A)(vii)(III)
(2)(A)

BEST COPY AVAILABLE

have in effect, for each child with a disability in its jurisdiction, an individualized education program, as defined in paragraph (1)(A).

"(B) PROGRAM FOR CHILD AGED 3 THROUGH 5.—In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State educational agency, a 2 year-old child with a disability who will turn age 3 during the school year), an individualized family service plan that contains the material described in section 636, and that is developed in accordance with this section, may serve as the IEP of the child if using that plan as the IEP is—

"(i) consistent with State policy; and

"(ii) agreed to by the agency and the child's parents.

"(3) DEVELOPMENT OF IEP.—

"(A) IN GENERAL.—In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider—

"(i) the strengths of the child and the concerns of the parents for enhancing the education of their child; and

"(ii) the results of the initial evaluation or most recent evaluation of the child.

"(B) CONSIDERATION OF SPECIAL FACTORS.—The IEP Team shall—

"(i) in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;

"(ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP;

"(iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

"(iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

"(v) consider whether the child requires assistive technology devices and services.

"(C) REQUIREMENT WITH RESPECT TO REGULAR EDUCATION TEACHER.—The regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP

614(d)(2)(B)-
(3)

of the child, including the determination of appropriate positive behavioral interventions and strategies and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(iii).

"(4) REVIEW AND REVISION OF IEP.—

"(A) IN GENERAL.—The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team—

"(i) reviews the child's IEP periodically, but not less than annually to determine whether the annual goals for the child are being achieved; and

"(ii) revises the IEP as appropriate to address—

"(I) any lack of expected progress toward the annual goals and in the general curriculum, where appropriate;

"(II) the results of any reevaluation conducted under this section;

"(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);

"(IV) the child's anticipated needs; or

"(V) other matters.

"(B) REQUIREMENT WITH RESPECT TO REGULAR EDUCATION TEACHER.—The regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the review and revision of the IEP of the child.

"(5) FAILURE TO MEET TRANSITION OBJECTIVES.—If a participating agency, other than the local educational agency, fails to provide the transition services described in the IEP in accordance with paragraph (1)(A)(vii), the local educational agency shall reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in that program.

"(6) CHILDREN WITH DISABILITIES IN ADULT PRISONS.—

"(A) IN GENERAL.—The following requirements do not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

"(i) The requirements contained in section 612(a)(17) and paragraph (1)(A)(v) of this subsection (relating to participation of children with disabilities in general assessments).

"(ii) The requirements of subclauses (I) and (II) of paragraph (1)(A)(vii) of this subsection (relating to transition planning and transition services), do not apply with respect to such children whose eligibility under this part will end, because of their age, before they will be released from prison.

"(B) ADDITIONAL REQUIREMENT.—If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of sections 612(a)(5)(A) and 614(d)(1)(A) if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

614(d)(4) -
(6)

BEST COPY AVAILABLE

"(e) CONSTRUCTION.—Nothing in this section shall be construed to require the IEP Team to include information under one component of a child's IEP that is already contained under another component of such IEP.

"(f) EDUCATIONAL PLACEMENTS.—Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

"SEC. 615. PROCEDURAL SAFEGUARDS.

"(a) ESTABLISHMENT OF PROCEDURES.—Any State educational agency, State agency, or local educational agency that receives assistance under this part shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

"(b) TYPES OF PROCEDURES.—The procedures required by this section shall include—

"(1) an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

"(2) procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents;

"(3) written prior notice to the parents of the child whenever such agency—

"(A) proposes to initiate or change; or

"(B) refuses to initiate or change;

the identification, evaluation, or educational placement of the child, in accordance with subsection (c), or the provision of a free appropriate public education to the child;

"(4) procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so;

"(5) an opportunity for mediation in accordance with subsection (e);

"(6) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

"(7) procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential)—

"(A) to the State educational agency or local educational agency, as the case may be, in the complaint filed under paragraph (6); and

"(B) that shall include—

614(e) -
615(b)(7)(B)

"(i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;

"(ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

"(iii) a proposed resolution of the problem to the extent known and available to the parents at the time; and

"(8) procedures that require the State educational agency to develop a model form to assist parents in filing a complaint in accordance with paragraph (7).

"(c) CONTENT OF PRIOR WRITTEN NOTICE.—The notice required by subsection (b)(3) shall include—

"(1) a description of the action proposed or refused by the agency;

"(2) an explanation of why the agency proposes or refuses to take the action;

"(3) a description of any other options that the agency considered and the reasons why those options were rejected;

"(4) a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

"(5) a description of any other factors that are relevant to the agency's proposal or refusal;

"(6) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

"(7) sources for parents to contact to obtain assistance in understanding the provisions of this part.

"(d) PROCEDURAL SAFEGUARDS NOTICE.—

"(1) IN GENERAL.—A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum—

"(A) upon initial referral for evaluation;

"(B) upon each notification of an individualized education program meeting and upon reevaluation of the child; and

"(C) upon registration of a complaint under subsection (b)(6).

"(2) CONTENTS.—The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so, and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to—

"(A) independent educational evaluation;

"(B) prior written notice;

"(C) parental consent;

"(D) access to educational records;

"(E) opportunity to present complaints;

"(F) the child's placement during pendency of due process proceedings;

"(G) procedures for students who are subject to placement in an interim alternative educational setting;

615(b)(7)(B)(i)-
(d)(2)(G)

BEST COPY AVAILABLE

"(H) requirements for unilateral placement by parents of children in private schools at public expense;

"(I) mediation;

"(J) due process hearings, including requirements for disclosure of evaluation results and recommendations;

"(K) State-level appeals (if applicable in that State);

"(L) civil actions; and

"(M) attorneys' fees.

"(e) MEDIATION.—

"(1) IN GENERAL.—Any State educational agency or local educational agency that receives assistance under this part shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) to resolve such disputes through a mediation process which, at a minimum, shall be available whenever a hearing is requested under subsection (f) or (k).

"(2) REQUIREMENTS.—Such procedures shall meet the following requirements:

"(A) The procedures shall ensure that the mediation process—

"(i) is voluntary on the part of the parties;

"(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this part; and

"(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

"(B) A local educational agency or a State agency may establish procedures to require parents who choose not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with—

"(i) a parent training and information center or community parent resource center in the State established under section 682 or 683; or

"(ii) an appropriate alternative dispute resolution entity;

to encourage the use, and explain the benefits, of the mediation process to the parents.

"(C) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

"(D) The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

"(E) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

"(F) An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

"(G) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required

615(d)(2)(H)-
(e)

to sign a confidentiality pledge prior to the commencement of such process.

"(f) Impartial Due Process Hearing.—

"(1) In general.—Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

"(2) Disclosure of evaluations and recommendations.—

"(A) In general.—At least 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

"(B) Failure to disclose.—A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

"(3) Limitation on conduct of hearing.—A hearing conducted pursuant to paragraph (1) may not be conducted by an employee of the State educational agency or the local educational agency involved in the education or care of the child.

"(g) Appeal.—If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency. Such agency shall conduct an impartial review of such decision. The officer conducting such review shall make an independent decision upon completion of such review.

"(h) Safeguards.—Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded—

"(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

"(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

"(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

"(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 617(c) (relating to the confidentiality of data, information, and records) and shall also be transmitted to the advisory panel established pursuant to section 612(a)(21)).

"(i) Administrative Procedures.—

"(1) In general.—

"(A) Decision made in hearing.—A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2) of this subsection.

615(f)-
(i)(1)(A)

BEST COPY AVAILABLE

BEST COPY AVAILABLE

"(B) Decision made at appeal.—A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

"(2) Right to bring civil action.—

"(A) In general.—Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

"(B) Additional requirements.—In any action brought under this paragraph, the court—

"(i) shall receive the records of the administrative proceedings;

"(ii) shall hear additional evidence at the request of a party; and

"(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

"(3) Jurisdiction of district courts; attorneys' fees.—

"(A) In general.—The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

"(B) Award of attorneys' fees.—In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

"(C) Determination of amount of attorneys' fees.—Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

"(D) Prohibition of attorneys' fees and related costs for certain services.—

"(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

"(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

"(II) the offer is not accepted within 10 days; and

"(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

"(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting

615(i)(1)(B)-
(3)(D)

is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) that is conducted prior to the filing of a complaint under subsection (b)(6) or (k) of this section.

"(E) Exception to prohibition on attorneys' fees and related costs.—Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

"(F) Reduction in amount of attorneys' fees.—Except as provided in subparagraph (G), whenever the court finds that—

"(i) the parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

"(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

"(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

"(iv) the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with subsection (b)(7);

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

"(G) Exception to reduction in amount of attorneys' fees.—The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

"(j) Maintenance of Current Educational Placement.—Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

"(k) Placement in Alternative Educational Setting.—

"(1) Authority of school personnel.—

"(A) School personnel under this section may order a change in the placement of a child with a disability—

"(i) to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities); and

"(ii) to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days if—

615(i)(3)(E)-(k)(1)(A)(ii)

"(I) the child carries a weapon to school or to a school function under the jurisdiction of a State or a local educational agency; or

"(II) the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local educational agency.

"(B) Either before or not later than 10 days after taking a disciplinary action described in subparagraph (A)—

"(i) if the local educational agency did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted in the suspension described in subparagraph (A), the agency shall convene an IEP meeting to develop an assessment plan to address that behavior; or

"(ii) if the child already has a behavioral intervention plan, the IEP Team shall review the plan and modify it, as necessary, to address the behavior.

"(2) AUTHORITY OF HEARING OFFICER.—A hearing officer under this section may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer—

"(A) determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others;

"(B) considers the appropriateness of the child's current placement;

"(C) considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and

"(D) determines that the interim alternative educational setting meets the requirements of paragraph (3)(B).

"(3) DETERMINATION OF SETTING.—

"(A) IN GENERAL.—The alternative educational setting described in paragraph (1)(A)(ii) shall be determined by the IEP Team.

"(B) ADDITIONAL REQUIREMENTS.—Any interim alternative educational setting in which a child is placed under paragraph (1) or (2) shall—

"(i) be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and

"(ii) include services and modifications designed to address the behavior described in paragraph (1) or paragraph (2) so that it does not recur.

"(4) MANIFESTATION DETERMINATION REVIEW.—

615(k)(1)(A)(ii)(I)-
(4)

"(A) In general.—If a disciplinary action is contemplated as described in paragraph (1) or paragraph (2) for a behavior of a child with a disability described in either of those paragraphs, or if a disciplinary action involving a change of placement for more than 10 days is contemplated for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the local educational agency that applies to all children—

"(i) not later than the date on which the decision to take that action is made, the parents shall be notified of that decision and of all procedural safeguards accorded under this section; and

"(ii) immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review shall be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.

"(B) Individuals to carry out review.—A review described in subparagraph (A) shall be conducted by the IEP Team and other qualified personnel.

"(C) Conduct of review.—In carrying out a review described in subparagraph (A), the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team—

"(i) first considers, in terms of the behavior subject to disciplinary action, all relevant information, including—

"(I) evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;

"(II) observations of the child; and

"(III) the child's IEP and placement; and

"(ii) then determines that—

"(I) in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

"(II) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

"(III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

"(5) Determination that behavior was not manifestation of disability.—

"(A) In general.—If the result of the review described in paragraph (4) is a determination, consistent with paragraph (4)(C), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in section 612(a)(1).

615(k)(4)(A) -
(5)(A)

BEST COPY AVAILABLE

"(B) ADDITIONAL REQUIREMENT.—If the public agency initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

"(6) PARENT APPEAL.—

"(A) IN GENERAL.—

"(i) If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing.

"(ii) The State or local educational agency shall arrange for an expedited hearing in any case described in this subsection when requested by a parent.

"(B) REVIEW OF DECISION.—

"(i) In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of such child's disability consistent with the requirements of paragraph (4)(C).

"(ii) In reviewing a decision under paragraph (1)(A)(ii) to place the child in an interim alternative educational setting, the hearing officer shall apply the standards set out in paragraph (2).

"(7) PLACEMENT DURING APPEALS.—

"(A) IN GENERAL.—When a parent requests a hearing regarding a disciplinary action described in paragraph (1)(A)(ii) or paragraph (2) to challenge the interim alternative educational setting or the manifestation determination, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(A)(ii) or paragraph (2), whichever occurs first, unless the parent and the State or local educational agency agree otherwise.

"(B) CURRENT PLACEMENT.—If a child is placed in an interim alternative educational setting pursuant to paragraph (1)(A)(ii) or paragraph (2) and school personnel propose to change the child's placement after expiration of the interim alternative placement, during the pendency of any proceeding to challenge the proposed change in placement, the child shall remain in the current placement (the child's placement prior to the interim alternative educational setting), except as provided in subparagraph (C).

"(C) EXPEDITED HEARING.—

"(i) If school personnel maintain that it is dangerous for the child to be in the current placement (placement prior to removal to the interim alternative education setting) during the pendency of the due process proceedings, the local educational agency may request an expedited hearing.

"(ii) In determining whether the child may be placed in the alternative educational setting or in

615(k)(5)(B)-
(7)

another appropriate placement ordered by the hearing officer, the hearing officer shall apply the standards set out in paragraph (2).

"(8) PROTECTIONS FOR CHILDREN NOT YET ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES.—

"(A) IN GENERAL.—A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in paragraph (1), may assert any of the protections provided for in this part if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

"(B) BASIS OF KNOWLEDGE.—A local educational agency shall be deemed to have knowledge that a child is a child with a disability if—

"(i) the parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to personnel of the appropriate educational agency that the child is in need of special education and related services;

"(ii) the behavior or performance of the child demonstrates the need for such services;

"(iii) the parent of the child has requested an evaluation of the child pursuant to section 614; or

"(iv) the teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency.

"(C) CONDITIONS THAT APPLY IF NO BASIS OF KNOWLEDGE.—

"(i) IN GENERAL.—If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B)) prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

"(ii) LIMITATIONS.—If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under paragraph (1) or (2), the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with the provisions of this part, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

615(k)(8)

BEST COPY AVAILABLE

"(9) REFERRAL TO AND ACTION BY LAW ENFORCEMENT AND JUDICIAL AUTHORITIES.—

"(A) Nothing in this part shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

"(B) An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

"(10) DEFINITIONS.—For purposes of this subsection, the following definitions apply:

"(A) CONTROLLED SUBSTANCE.—The term 'controlled substance' means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

"(B) ILLEGAL DRUG.—The term 'illegal drug'—

"(i) means a controlled substance; but

"(ii) does not include such a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

"(C) SUBSTANTIAL EVIDENCE.—The term 'substantial evidence' means beyond a preponderance of the evidence.

"(D) WEAPON.—The term 'weapon' has the meaning given the term 'dangerous weapon' under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

"(l) RULE OF CONSTRUCTION.—Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this part.

"(m) TRANSFER OF PARENTAL RIGHTS AT AGE OF MAJORITY.—

"(1) IN GENERAL.—A State that receives amounts from a grant under this part may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)—

"(A) the public agency shall provide any notice required by this section to both the individual and the parents;

"(B) all other rights accorded to parents under this part transfer to the child;

"(C) the agency shall notify the individual and the parents of the transfer of rights; and

"(D) all rights accorded to parents under this part transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

615(k)(9) -
(m)(1)

"(2) SPECIAL RULE.—If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this part.

"SEC. 616. WITHHOLDING AND JUDICIAL REVIEW.

"(a) WITHHOLDING OF PAYMENTS.—

"(1) IN GENERAL.—Whenever the Secretary, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or State agency affected by any failure described in subparagraph (B)), finds—

"(A) that there has been a failure by the State to comply substantially with any provision of this part; or

"(B) that there is a failure to comply with any condition of a local educational agency's or State agency's eligibility under this part, including the terms of any agreement to achieve compliance with this part within the timelines specified in the agreement;

the Secretary shall, after notifying the State educational agency, withhold, in whole or in part, any further payments to the State under this part, or refer the matter for appropriate enforcement action, which may include referral to the Department of Justice.

"(2) NATURE OF WITHHOLDING.—If the Secretary withholds further payments under paragraph (1), the Secretary may determine that such withholding will be limited to programs or projects, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this part to specified local educational agencies or State agencies affected by the failure. Until the Secretary is satisfied that there is no longer any failure to comply with the provisions of this part, as specified in subparagraph (A) or (B) of paragraph (1), payments to the State under this part shall be withheld in whole or in part, or payments by the State educational agency under this part shall be limited to local educational agencies and State agencies whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, State agency, or local educational agency that has received notice under paragraph (1) shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency.

"(b) JUDICIAL REVIEW.—

"(1) IN GENERAL.—If any State is dissatisfied with the Secretary's final action with respect to the eligibility of the State under section 612, such State may, not later than 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition

615(m)(2) -
616(b)(1)

BEST COPY AVAILABLE

shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings upon which the Secretary's action was based, as provided in section 2112 of title 28, United States Code.

"(2) JURISDICTION; REVIEW BY UNITED STATES SUPREME COURT.—Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

"(3) STANDARD OF REVIEW.—The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

"(c) DIVIDED STATE AGENCY RESPONSIBILITY.—For purposes of this section, where responsibility for ensuring that the requirements of this part are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons is assigned to a public agency other than the State educational agency pursuant to section 612(a)(11)(C), the Secretary, in instances where the Secretary finds that the failure to comply substantially with the provisions of this part are related to a failure by the public agency, shall take appropriate corrective action to ensure compliance with this part, except—

"(1) any reduction or withholding of payments to the State is proportionate to the total funds allotted under section 611 to the State as the number of eligible children with disabilities in adult prisons under the supervision of the other public agency is proportionate to the number of eligible individuals with disabilities in the State under the supervision of the State educational agency; and

"(2) any withholding of funds under paragraph (1) shall be limited to the specific agency responsible for the failure to comply with this part.

"SEC. 617. ADMINISTRATION.

"(a) RESPONSIBILITIES OF SECRETARY.—In carrying out this part, the Secretary shall—

"(1) cooperate with, and (directly or by grant or contract) furnish technical assistance necessary to, the State in matters relating to—

"(A) the education of children with disabilities; and

"(B) carrying out this part; and

"(2) provide short-term training programs and institutes.

"(b) RULES AND REGULATIONS.—In carrying out the provisions of this part, the Secretary shall issue regulations under this Act only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements of this Act.

616(b)(2) -
617(b)

“(c) CONFIDENTIALITY.—The Secretary shall take appropriate action, in accordance with the provisions of section 444 of the General Education Provisions Act (20 U.S.C. 1232g), to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State and local educational agencies pursuant to the provisions of this part.

“(d) PERSONNEL.—The Secretary is authorized to hire qualified personnel necessary to carry out the Secretary's duties under subsection (a) and under sections 618, 661, and 673 (or their predecessor authorities through October 1, 1997) without regard to the provisions of title 5, United States Code, relating to appointments in the competitive service and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and general schedule pay rates, except that no more than twenty such personnel shall be employed at any time.

“SEC. 618. PROGRAM INFORMATION.

“(a) IN GENERAL.—Each State that receives assistance under this part, and the Secretary of the Interior, shall provide data each year to the Secretary—

“(1)(A) on—

“(i) the number of children with disabilities, by race, ethnicity, and disability category, who are receiving a free appropriate public education;

“(ii) the number of children with disabilities, by race and ethnicity, who are receiving early intervention services;

“(iii) the number of children with disabilities, by race, ethnicity, and disability category, who are participating in regular education;

“(iv) the number of children with disabilities, by race, ethnicity, and disability category, who are in separate classes, separate schools or facilities, or public or private residential facilities;

“(v) the number of children with disabilities, by race, ethnicity, and disability category, who, for each year of age from age 14 to 21, stopped receiving special education and related services because of program completion or other reasons and the reasons why those children stopped receiving special education and related services;

“(vi) the number of children with disabilities, by race and ethnicity, who, from birth through age 2, stopped receiving early intervention services because of program completion or for other reasons; and

“(vii)(I) the number of children with disabilities, by race, ethnicity, and disability category, who under subparagraphs (A)(ii) and (B) of section 615(k)(1), are removed to an interim alternative educational setting;

“(II) the acts or items precipitating those removals; and

“(III) the number of children with disabilities who are subject to long-term suspensions or expulsions; and

“(B) on the number of infants and toddlers, by race and ethnicity, who are at risk of having substantial developmental delays (as described in section 632), and who are receiving early intervention services under part C; and

617(c)-
618(a)(1)

BEST COPY AVAILABLE

“(2) on any other information that may be required by the Secretary.

“(b) SAMPLING.—The Secretary may permit States and the Secretary of the Interior to obtain the data described in subsection (a) through sampling.

“(c) DISPROPORTIONALITY.—

“(1) IN GENERAL.—Each State that receives assistance under this part, and the Secretary of the Interior, shall provide for the collection and examination of data to determine if significant disproportionality based on race is occurring in the State with respect to—

“(A) the identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 602(3); and

“(B) the placement in particular educational settings of such children.

“(2) REVIEW AND REVISION OF POLICIES, PRACTICES, AND PROCEDURES.—In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities, or the placement in particular educational settings of such children, in accordance with paragraph (1), the State or the Secretary of the Interior, as the case may be, shall provide for the review and, if appropriate, revision of the policies, procedures, and practices used in such identification or placement to ensure that such policies, procedures, and practices comply with the requirements of this Act.

“SEC. 619. PRESCHOOL GRANTS.

“(a) IN GENERAL.—The Secretary shall provide grants under this section to assist States to provide special education and related services, in accordance with this part—

“(1) to children with disabilities aged 3 through 5, inclusive; and

“(2) at the State's discretion, to 2-year-old children with disabilities who will turn 3 during the school year.

“(b) ELIGIBILITY.—A State shall be eligible for a grant under this section if such State—

“(1) is eligible under section 612 to receive a grant under this part; and

“(2) makes a free appropriate public education available to all children with disabilities, aged 3 through 5, residing in the State.

“(c) ALLOCATIONS TO STATES.—

“(1) IN GENERAL.—After reserving funds for studies and evaluations under section 674(e), the Secretary shall allocate the remaining amount among the States in accordance with paragraph (2) or (3), as the case may be.

“(2) INCREASE IN FUNDS.—If the amount available for allocations to States under paragraph (1) is equal to or greater than the amount allocated to the States under this section for the preceding fiscal year, those allocations shall be calculated as follows:

“(A)(i) Except as provided in subparagraph (B), the Secretary shall—

“(I) allocate to each State the amount it received for fiscal year 1997;

618(a)(2) -
619(c)(2)(A)(i)(I).

"(II) allocate 85 percent of any remaining funds to States on the basis of their relative populations of children aged 3 through 5; and

"(III) allocate 15 percent of those remaining funds to States on the basis of their relative populations of all children aged 3 through 5 who are living in poverty.

"(ii) For the purpose of making grants under this paragraph, the Secretary shall use the most recent population data, including data on children living in poverty, that are available and satisfactory to the Secretary.

"(B) Notwithstanding subparagraph (A), allocations under this paragraph shall be subject to the following:

"(i) No State's allocation shall be less than its allocation for the preceding fiscal year.

"(ii) No State's allocation shall be less than the greatest of—

"(I) the sum of—

"(aa) the amount it received for fiscal year 1997; and

"(bb) one third of one percent of the amount by which the amount appropriated under subsection (j) exceeds the amount appropriated under this section for fiscal year 1997;

"(II) the sum of—

"(aa) the amount it received for the preceding fiscal year; and

"(bb) that amount multiplied by the percentage by which the increase in the funds appropriated from the preceding fiscal year exceeds 1.5 percent; or

"(III) the sum of—

"(aa) the amount it received for the preceding fiscal year; and

"(bb) that amount multiplied by 90 percent of the percentage increase in the amount appropriated from the preceding fiscal year.

"(iii) Notwithstanding clause (ii), no State's allocation under this paragraph shall exceed the sum of—

"(I) the amount it received for the preceding fiscal year; and

"(II) that amount multiplied by the sum of 1.5 percent and the percentage increase in the amount appropriated.

"(C) If the amount available for allocations under this paragraph is insufficient to pay those allocations in full, those allocations shall be ratably reduced, subject to subparagraph (B)(i).

"(3) DECREASE IN FUNDS.—If the amount available for allocations to States under paragraph (1) is less than the amount allocated to the States under this section for the preceding fiscal year, those allocations shall be calculated as follows:

"(A) If the amount available for allocations is greater than the amount allocated to the States for fiscal year 1997, each State shall be allocated the sum of—

619(c)(2)(A)(i)(II)-
(3)(A)

BEST COPY AVAILABLE

"(i) the amount it received for fiscal year 1997; and

"(ii) an amount that bears the same relation to any remaining funds as the increase the State received for the preceding fiscal year over fiscal year 1997 bears to the total of all such increases for all States.

"(B) If the amount available for allocations is equal to or less than the amount allocated to the States for fiscal year 1997, each State shall be allocated the amount it received for that year, ratably reduced, if necessary.

"(4) OUTLYING AREAS.—The Secretary shall increase the fiscal year 1998 allotment of each outlying area under section 611 by at least the amount that that area received under this section for fiscal year 1997.

"(d) RESERVATION FOR STATE ACTIVITIES.—

"(1) IN GENERAL.—Each State may retain not more than the amount described in paragraph (2) for administration and other State-level activities in accordance with subsections (e) and (f).

"(2) AMOUNT DESCRIBED.—For each fiscal year, the Secretary shall determine and report to the State educational agency an amount that is 25 percent of the amount the State received under this section for fiscal year 1997, cumulatively adjusted by the Secretary for each succeeding fiscal year by the lesser of—

"(A) the percentage increase, if any, from the preceding fiscal year in the State's allocation under this section; or

"(B) the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor.

"(e) STATE ADMINISTRATION.—

"(1) IN GENERAL.—For the purpose of administering this section (including the coordination of activities under this part with, and providing technical assistance to, other programs that provide services to children with disabilities) a State may use not more than 20 percent of the maximum amount it may retain under subsection (d) for any fiscal year.

"(2) ADMINISTRATION OF PART C.—Funds described in paragraph (1) may also be used for the administration of part C of this Act, if the State educational agency is the lead agency for the State under that part.

"(f) OTHER STATE-LEVEL ACTIVITIES.—Each State shall use any funds it retains under subsection (d) and does not use for administration under subsection (e)—

"(1) for support services (including establishing and implementing the mediation process required by section 615(e)), which may benefit children with disabilities younger than 3 or older than 5 as long as those services also benefit children with disabilities aged 3 through 5;

"(2) for direct services for children eligible for services under this section;

"(3) to develop a State improvement plan under subpart 1 of part D;

"(4) for activities at the State and local levels to meet the performance goals established by the State under section

619(c)(3)(A)(i) -
(f)(4)

612(a)(16) and to support implementation of the State improvement plan under subpart 1 of part D if the State receives funds under that subpart; or

"(5) to supplement other funds used to develop and implement a Statewide coordinated services system designed to improve results for children and families, including children with disabilities and their families, but not to exceed one percent of the amount received by the State under this section for a fiscal year.

"(g) SUBGRANTS TO LOCAL EDUCATIONAL AGENCIES.—

"(1) SUBGRANTS REQUIRED.—Each State that receives a grant under this section for any fiscal year shall distribute any of the grant funds that it does not reserve under subsection (d) to local educational agencies in the State that have established their eligibility under section 613, as follows:

"(A) BASE PAYMENTS.—The State shall first award each agency described in paragraph (1) the amount that agency would have received under this section for fiscal year 1997 if the State had distributed 75 percent of its grant for that year under section 619(c)(3), as then in effect.

"(B) ALLOCATION OF REMAINING FUNDS.—After making allocations under subparagraph (A), the State shall—

"(i) allocate 85 percent of any remaining funds to those agencies on the basis of the relative numbers of children enrolled in public and private elementary and secondary schools within the agency's jurisdiction; and

"(ii) allocate 15 percent of those remaining funds to those agencies in accordance with their relative numbers of children living in poverty, as determined by the State educational agency.

"(2) REALLOCATION OF FUNDS.—If a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all children with disabilities aged 3 through 5 residing in the area served by that agency with State and local funds, the State educational agency may reallocate any portion of the funds under this section that are not needed by that local agency to provide a free appropriate public education to other local educational agencies in the State that are not adequately providing special education and related services to all children with disabilities aged 3 through 5 residing in the areas they serve.

"(h) PART C INAPPLICABLE.—Part C of this Act does not apply to any child with a disability receiving a free appropriate public education, in accordance with this part, with funds received under this section.

"(i) DEFINITION.—For the purpose of this section, the term 'State' means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

"(j) AUTHORIZATION OF APPROPRIATIONS.—For the purpose of carrying out this section, there are authorized to be appropriated to the Secretary $500,000,000 for fiscal year 1998 and such sums as may be necessary for each subsequent fiscal year.

619(f)(5)-
(j)

BEST COPY AVAILABLE

"PART C—INFANTS AND TODDLERS WITH DISABILITIES

"SEC. 631. FINDINGS AND POLICY.

"(a) FINDINGS.—The Congress finds that there is an urgent and substantial need—

"(1) to enhance the development of infants and toddlers with disabilities and to minimize their potential for developmental delay;

"(2) to reduce the educational costs to our society, including our Nation's schools, by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age;

"(3) to minimize the likelihood of institutionalization of individuals with disabilities and maximize the potential for their independently living in society;

"(4) to enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities; and

"(5) to enhance the capacity of State and local agencies and service providers to identify, evaluate, and meet the needs of historically underrepresented populations, particularly minority, low-income, inner-city, and rural populations.

"(b) POLICY.—It is therefore the policy of the United States to provide financial assistance to States—

"(1) to develop and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency system that provides early intervention services for infants and toddlers with disabilities and their families;

"(2) to facilitate the coordination of payment for early intervention services from Federal, State, local, and private sources (including public and private insurance coverage);

"(3) to enhance their capacity to provide quality early intervention services and expand and improve existing early intervention services being provided to infants and toddlers with disabilities and their families; and

"(4) to encourage States to expand opportunities for children under 3 years of age who would be at risk of having substantial developmental delay if they did not receive early intervention services.

"SEC. 632. DEFINITIONS.

"As used in this part:

"(1) AT-RISK INFANT OR TODDLER.—The term 'at-risk infant or toddler' means an individual under 3 years of age who would be at risk of experiencing a substantial developmental delay if early intervention services were not provided to the individual.

"(2) COUNCIL.—The term 'council' means a State interagency coordinating council established under section 641.

"(3) DEVELOPMENTAL DELAY.—The term 'developmental delay', when used with respect to an individual residing in a State, has the meaning given such term by the State under section 635(a)(1).

"(4) EARLY INTERVENTION SERVICES.—The term 'early intervention services' means developmental services that—

"(A) are provided under public supervision;

631 -
632(4)(A)

"(B) are provided at no cost except where Federal or State law provides for a system of payments by families, including a schedule of sliding fees;

"(C) are designed to meet the developmental needs of an infant or toddler with a disability in any one or more of the following areas—

"(i) physical development;
"(ii) cognitive development;
"(iii) communication development;
"(iv) social or emotional development; or
"(v) adaptive development;

"(D) meet the standards of the State in which they are provided, including the requirements of this part;

"(E) include—

"(i) family training, counseling, and home visits;
"(ii) special instruction;
"(iii) speech-language pathology and audiology services;
"(iv) occupational therapy;
"(v) physical therapy;
"(vi) psychological services;
"(vii) service coordination services;
"(viii) medical services only for diagnostic or evaluation purposes;
"(ix) early identification, screening, and assessment services;
"(x) health services necessary to enable the infant or toddler to benefit from the other early intervention services;
"(xi) social work services;
"(xii) vision services;
"(xiii) assistive technology devices and assistive technology services; and
"(xiv) transportation and related costs that are necessary to enable an infant or toddler and the infant's or toddler's family to receive another service described in this paragraph;

"(F) are provided by qualified personnel, including—

"(i) special educators;
"(ii) speech-language pathologists and audiologists;
"(iii) occupational therapists;
"(iv) physical therapists;
"(v) psychologists;
"(vi) social workers;
"(vii) nurses;
"(viii) nutritionists;
"(ix) family therapists;
"(x) orientation and mobility specialists; and
"(xi) pediatricians and other physicians;

"(G) to the maximum extent appropriate, are provided in natural environments, including the home, and community settings in which children without disabilities participate; and

"(H) are provided in conformity with an individualized family service plan adopted in accordance with section 636.

632(4)(B)-
(H)

"(5) INFANT OR TODDLER WITH A DISABILITY.—The term 'infant or toddler with a disability'—

"(A) means an individual under 3 years of age who needs early intervention services because the individual—

"(i) is experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures in one or more of the areas of cognitive development, physical development, communication development, social or emotional development, and adaptive development; or

"(ii) has a diagnosed physical or mental condition which has a high probability of resulting in developmental delay; and

"(B) may also include, at a State's discretion, at-risk infants and toddlers.

"SEC. 633. GENERAL AUTHORITY.

"The Secretary shall, in accordance with this part, make grants to States (from their allotments under section 643) to assist each State to maintain and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency system to provide early intervention services for infants and toddlers with disabilities and their families.

"SEC. 634. ELIGIBILITY.

"In order to be eligible for a grant under section 633, a State shall demonstrate to the Secretary that the State—

"(1) has adopted a policy that appropriate early intervention services are available to all infants and toddlers with disabilities in the State and their families, including Indian infants and toddlers with disabilities and their families residing on a reservation geographically located in the State; and

"(2) has in effect a statewide system that meets the requirements of section 635.

"SEC. 635. REQUIREMENTS FOR STATEWIDE SYSTEM.

"(a) IN GENERAL.—A statewide system described in section 633 shall include, at a minimum, the following components:

"(1) A definition of the term 'developmental delay' that will be used by the State in carrying out programs under this part.

"(2) A State policy that is in effect and that ensures that appropriate early intervention services are available to all infants and toddlers with disabilities and their families, including Indian infants and toddlers and their families residing on a reservation geographically located in the State.

"(3) A timely, comprehensive, multidisciplinary evaluation of the functioning of each infant or toddler with a disability in the State, and a family-directed identification of the needs of each family of such an infant or toddler, to appropriately assist in the development of the infant or toddler.

"(4) For each infant or toddler with a disability in the State, an individualized family service plan in accordance with section 636, including service coordination services in accordance with such service plan.

"(5) A comprehensive child find system, consistent with part B, including a system for making referrals to service

632(5)-
635(a)(5)

providers that includes timelines and provides for participation by primary referral sources.

“(6) A public awareness program focusing on early identification of infants and toddlers with disabilities, including the preparation and dissemination by the lead agency designated or established under paragraph (10) to all primary referral sources, especially hospitals and physicians, of information for parents on the availability of early intervention services, and procedures for determining the extent to which such sources disseminate such information to parents of infants and toddlers.

“(7) A central directory which includes information on early intervention services, resources, and experts available in the State and research and demonstration projects being conducted in the State.

“(8) A comprehensive system of personnel development, including the training of paraprofessionals and the training of primary referral sources respecting the basic components of early intervention services available in the State, that is consistent with the comprehensive system of personnel development described in section 612(a)(14) and may include—

“(A) implementing innovative strategies and activities for the recruitment and retention of early education service providers;

“(B) promoting the preparation of early intervention providers who are fully and appropriately qualified to provide early intervention services under this part;

“(C) training personnel to work in rural and inner-city areas; and

“(D) training personnel to coordinate transition services for infants and toddlers served under this part from an early intervention program under this part to preschool or other appropriate services.

“(9) Subject to subsection (b), policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out this part are appropriately and adequately prepared and trained, including—

“(A) the establishment and maintenance of standards which are consistent with any State-approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which such personnel are providing early intervention services; and

“(B) to the extent such standards are not based on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is taking to require the retraining or hiring of personnel that meet appropriate professional requirements in the State;

except that nothing in this part, including this paragraph, prohibits the use of paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulations, or written policy, to assist in the provision of early intervention services to infants and toddlers with disabilities under this part.

“(10) A single line of responsibility in a lead agency designated or established by the Governor for carrying out—

“(A) the general administration and supervision of programs and activities receiving assistance under section 633, and the monitoring of programs and activities used by

635(a)(6) -
(10)(A)

BEST COPY AVAILABLE

the State to carry out this part, whether or not such programs or activities are receiving assistance made available under section 633, to ensure that the State complies with this part;

"(B) the identification and coordination of all available resources within the State from Federal, State, local, and private sources;

"(C) the assignment of financial responsibility in accordance with section 637(a)(2) to the appropriate agencies;

"(D) the development of procedures to ensure that services are provided to infants and toddlers with disabilities and their families under this part in a timely manner pending the resolution of any disputes among public agencies or service providers;

"(E) the resolution of intra- and interagency disputes; and

"(F) the entry into formal interagency agreements that define the financial responsibility of each agency for paying for early intervention services (consistent with State law) and procedures for resolving disputes and that include all additional components necessary to ensure meaningful cooperation and coordination.

"(11) A policy pertaining to the contracting or making of other arrangements with service providers to provide early intervention services in the State, consistent with the provisions of this part, including the contents of the application used and the conditions of the contract or other arrangements.

"(12) A procedure for securing timely reimbursements of funds used under this part in accordance with section 640(a).

"(13) Procedural safeguards with respect to programs under this part, as required by section 639.

"(14) A system for compiling data requested by the Secretary under section 618 that relates to this part.

"(15) A State interagency coordinating council that meets the requirements of section 641.

"(16) Policies and procedures to ensure that, consistent with section 636(d)(5)—

"(A) to the maximum extent appropriate, early intervention services are provided in natural environments; and

"(B) the provision of early intervention services for any infant or toddler occurs in a setting other than a natural environment only when early intervention cannot be achieved satisfactorily for the infant or toddler in a natural environment.

"(b) POLICY.—In implementing subsection (a)(9), a State may adopt a policy that includes making ongoing good-faith efforts to recruit and hire appropriately and adequately trained personnel to provide early intervention services to infants and toddlers with disabilities, including, in a geographic area of the State where there is a shortage of such personnel, the most qualified individuals available who are making satisfactory progress toward completing applicable course work necessary to meet the standards described in subsection (a)(9), consistent with State law within 3 years.

635(a)(10)(B)-
(b)

"SEC. 636. INDIVIDUALIZED FAMILY SERVICE PLAN.

"(a) ASSESSMENT AND PROGRAM DEVELOPMENT.—A statewide system described in section 633 shall provide, at a minimum, for each infant or toddler with a disability, and the infant's or toddler's family, to receive—

"(1) a multidisciplinary assessment of the unique strengths and needs of the infant or toddler and the identification of services appropriate to meet such needs;

"(2) a family-directed assessment of the resources, priorities, and concerns of the family and the identification of the supports and services necessary to enhance the family's capacity to meet the developmental needs of the infant or toddler; and

"(3) a written individualized family service plan developed by a multidisciplinary team, including the parents, as required by subsection (e).

"(b) PERIODIC REVIEW.—The individualized family service plan shall be evaluated once a year and the family shall be provided a review of the plan at 6-month intervals (or more often where appropriate based on infant or toddler and family needs).

"(c) PROMPTNESS AFTER ASSESSMENT.—The individualized family service plan shall be developed within a reasonable time after the assessment required by subsection (a)(1) is completed. With the parents' consent, early intervention services may commence prior to the completion of the assessment.

"(d) CONTENT OF PLAN.—The individualized family service plan shall be in writing and contain—

"(1) a statement of the infant's or toddler's present levels of physical development, cognitive development, communication development, social or emotional development, and adaptive development, based on objective criteria;

"(2) a statement of the family's resources, priorities, and concerns relating to enhancing the development of the family's infant or toddler with a disability;

"(3) a statement of the major outcomes expected to be achieved for the infant or toddler and the family, and the criteria, procedures, and timelines used to determine the degree to which progress toward achieving the outcomes is being made and whether modifications or revisions of the outcomes or services are necessary;

"(4) a statement of specific early intervention services necessary to meet the unique needs of the infant or toddler and the family, including the frequency, intensity, and method of delivering services;

"(5) a statement of the natural environments in which early intervention services shall appropriately be provided, including a justification of the extent, if any, to which the services will not be provided in a natural environment;

"(6) the projected dates for initiation of services and the anticipated duration of the services;

"(7) the identification of the service coordinator from the profession most immediately relevant to the infant's or toddler's or family's needs (or who is otherwise qualified to carry out all applicable responsibilities under this part) who will be responsible for the implementation of the plan and coordination with other agencies and persons; and

636(a)-
(d)(7)

BEST COPY AVAILABLE

"(8) the steps to be taken to support the transition of the toddler with a disability to preschool or other appropriate services.

"(e) PARENTAL CONSENT.—The contents of the individualized family service plan shall be fully explained to the parents and informed written consent from the parents shall be obtained prior to the provision of early intervention services described in such plan. If the parents do not provide consent with respect to a particular early intervention service, then the early intervention services to which consent is obtained shall be provided.

"SEC. 637. STATE APPLICATION AND ASSURANCES.

"(a) APPLICATION.—A State desiring to receive a grant under section 633 shall submit an application to the Secretary at such time and in such manner as the Secretary may reasonably require. The application shall contain—

"(1) a designation of the lead agency in the State that will be responsible for the administration of funds provided under section 633;

"(2) a designation of an individual or entity responsible for assigning financial responsibility among appropriate agencies;

"(3) information demonstrating eligibility of the State under section 634, including—

"(A) information demonstrating to the Secretary's satisfaction that the State has in effect the statewide system required by section 633; and

"(B) a description of services to be provided to infants and toddlers with disabilities and their families through the system;

"(4) if the State provides services to at-risk infants and toddlers through the system, a description of such services;

"(5) a description of the uses for which funds will be expended in accordance with this part;

"(6) a description of the procedure used to ensure that resources are made available under this part for all geographic areas within the State;

"(7) a description of State policies and procedures that ensure that, prior to the adoption by the State of any other policy or procedure necessary to meet the requirements of this part, there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of infants and toddlers with disabilities;

"(8) a description of the policies and procedures to be used—

"(A) to ensure a smooth transition for toddlers receiving early intervention services under this part to preschool or other appropriate services, including a description of how—

"(i) the families of such toddlers will be included in the transition plans required by subparagraph (C); and

"(ii) the lead agency designated or established under section 635(a)(10) will—

"(I) notify the local educational agency for the area in which such a child resides that the child will shortly reach the age of eligibility for preschool

636(d)(8) -
637(a)(8)(A)(ii)

services under part B, as determined in accordance with State law;

"(II) in the case of a child who may be eligible for such preschool services, with the approval of the family of the child, convene a conference among the lead agency, the family, and the local educational agency at least 90 days (and at the discretion of all such parties, up to 6 months) before the child is eligible for the preschool services, to discuss any such services that the child may receive; and

"(III) in the case of a child who may not be eligible for such preschool services, with the approval of the family, make reasonable efforts to convene a conference among the lead agency, the family, and providers of other appropriate services for children who are not eligible for preschool services under part B, to discuss the appropriate services that the child may receive;

"(B) to review the child's program options for the period from the child's third birthday through the remainder of the school year; and

"(C) to establish a transition plan; and

"(9) such other information and assurances as the Secretary may reasonably require.

"(b) ASSURANCES.—The application described in subsection (a)—

"(1) shall provide satisfactory assurance that Federal funds made available under section 643 to the State will be expended in accordance with this part;

"(2) shall contain an assurance that the State will comply with the requirements of section 640;

"(3) shall provide satisfactory assurance that the control of funds provided under section 643, and title to property derived from those funds, will be in a public agency for the uses and purposes provided in this part and that a public agency will administer such funds and property;

"(4) shall provide for—

"(A) making such reports in such form and containing such information as the Secretary may require to carry out the Secretary's functions under this part; and

"(B) keeping such records and affording such access to them as the Secretary may find necessary to ensure the correctness and verification of those reports and proper disbursement of Federal funds under this part;

"(5) provide satisfactory assurance that Federal funds made available under section 643 to the State—

"(A) will not be commingled with State funds; and

"(B) will be used so as to supplement the level of State and local funds expended for infants and toddlers with disabilities and their families and in no case to supplant those State and local funds;

"(6) shall provide satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to ensure proper disbursement of, and accounting for, Federal funds paid under section 643 to the State;

637(a)(8)(A)(ii)(II)
(b)(6)

"(7) shall provide satisfactory assurance that policies and procedures have been adopted to ensure meaningful involvement of underserved groups, including minority, low-income, and rural families, in the planning and implementation of all the requirements of this part; and

"(8) shall contain such other information and assurances as the Secretary may reasonably require by regulation.

"(c) STANDARD FOR DISAPPROVAL OF APPLICATION.—The Secretary may not disapprove such an application unless the Secretary determines, after notice and opportunity for a hearing, that the application fails to comply with the requirements of this section.

"(d) SUBSEQUENT STATE APPLICATION.—If a State has on file with the Secretary a policy, procedure, or assurance that demonstrates that the State meets a requirement of this section, including any policy or procedure filed under part H (as in effect before July 1, 1998), the Secretary shall consider the State to have met the requirement for purposes of receiving a grant under this part.

"(e) MODIFICATION OF APPLICATION.—An application submitted by a State in accordance with this section shall remain in effect until the State submits to the Secretary such modifications as the State determines necessary. This section shall apply to a modification of an application to the same extent and in the same manner as this section applies to the original application.

"(f) MODIFICATIONS REQUIRED BY THE SECRETARY.—The Secretary may require a State to modify its application under this section, but only to the extent necessary to ensure the State's compliance with this part, if—

"(1) an amendment is made to this Act, or a Federal regulation issued under this Act;

"(2) a new interpretation of this Act is made by a Federal court or the State's highest court; or

"(3) an official finding of noncompliance with Federal law or regulations is made with respect to the State.

"SEC. 638. USES OF FUNDS.

"In addition to using funds provided under section 633 to maintain and implement the statewide system required by such section, a State may use such funds—

"(1) for direct early intervention services for infants and toddlers with disabilities, and their families, under this part that are not otherwise funded through other public or private sources;

"(2) to expand and improve on services for infants and toddlers and their families under this part that are otherwise available;

"(3) to provide a free appropriate public education, in accordance with part B, to children with disabilities from their third birthday to the beginning of the following school year; and

"(4) in any State that does not provide services for at-risk infants and toddlers under section 637(a)(4), to strengthen the statewide system by initiating, expanding, or improving collaborative efforts related to at-risk infants and toddlers, including establishing linkages with appropriate public or private community-based organizations, services, and personnel for the purposes of—

637(b)(7)-
638(4)

"(A) identifying and evaluating at-risk infants and toddlers;

"(B) making referrals of the infants and toddlers identified and evaluated under subparagraph (A); and

"(C) conducting periodic follow-up on each such referral to determine if the status of the infant or toddler involved has changed with respect to the eligibility of the infant or toddler for services under this part.

"SEC. 639. PROCEDURAL SAFEGUARDS.

"(a) MINIMUM PROCEDURES.—The procedural safeguards required to be included in a statewide system under section 635(a)(13) shall provide, at a minimum, the following:

"(1) The timely administrative resolution of complaints by parents. Any party aggrieved by the findings and decision regarding an administrative complaint shall have the right to bring a civil action with respect to the complaint in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph, the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

"(2) The right to confidentiality of personally identifiable information, including the right of parents to written notice of and written consent to the exchange of such information among agencies consistent with Federal and State law.

"(3) The right of the parents to determine whether they, their infant or toddler, or other family members will accept or decline any early intervention service under this part in accordance with State law without jeopardizing other early intervention services under this part.

"(4) The opportunity for parents to examine records relating to assessment, screening, eligibility determinations, and the development and implementation of the individualized family service plan.

"(5) Procedures to protect the rights of the infant or toddler whenever the parents of the infant or toddler are not known or cannot be found or the infant or toddler is a ward of the State, including the assignment of an individual (who shall not be an employee of the State lead agency, or other State agency, and who shall not be any person, or any employee of a person, providing early intervention services to the infant or toddler or any family member of the infant or toddler) to act as a surrogate for the parents.

"(6) Written prior notice to the parents of the infant or toddler with a disability whenever the State agency or service provider proposes to initiate or change or refuses to initiate or change the identification, evaluation, or placement of the infant or toddler with a disability, or the provision of appropriate early intervention services to the infant or toddler.

"(7) Procedures designed to ensure that the notice required by paragraph (6) fully informs the parents, in the parents' native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section.

638(4)(A) -
639(a)(7)

BEST COPY AVAILABLE

"(8) The right of parents to use mediation in accordance with section 615(e), except that—

"(A) any reference in the section to a State educational agency shall be considered to be a reference to a State's lead agency established or designated under section 635(a)(10);

"(B) any reference in the section to a local educational agency shall be considered to be a reference to a local service provider or the State's lead agency under this part, as the case may be; and

"(C) any reference in the section to the provision of free appropriate public education to children with disabilities shall be considered to be a reference to the provision of appropriate early intervention services to infants and toddlers with disabilities.

"(b) SERVICES DURING PENDENCY OF PROCEEDINGS.—During the pendency of any proceeding or action involving a complaint by the parents of an infant or toddler with a disability, unless the State agency and the parents otherwise agree, the infant or toddler shall continue to receive the appropriate early intervention services currently being provided or, if applying for initial services, shall receive the services not in dispute.

"SEC. 640. PAYOR OF LAST RESORT.

"(a) NONSUBSTITUTION.—Funds provided under section 643 may not be used to satisfy a financial commitment for services that would have been paid for from another public or private source, including any medical program administered by the Secretary of Defense, but for the enactment of this part, except that whenever considered necessary to prevent a delay in the receipt of appropriate early intervention services by an infant, toddler, or family in a timely fashion, funds provided under section 643 may be used to pay the provider of services pending reimbursement from the agency that has ultimate responsibility for the payment.

"(b) REDUCTION OF OTHER BENEFITS.—Nothing in this part shall be construed to permit the State to reduce medical or other assistance available or to alter eligibility under title V of the Social Security Act (relating to maternal and child health) or title XIX of the Social Security Act (relating to Medicaid for infants or toddlers with disabilities) within the State.

"SEC. 641. STATE INTERAGENCY COORDINATING COUNCIL.

"(a) ESTABLISHMENT.—

"(1) IN GENERAL.—A State that desires to receive financial assistance under this part shall establish a State interagency coordinating council.

"(2) APPOINTMENT.—The council shall be appointed by the Governor. In making appointments to the council, the Governor shall ensure that the membership of the council reasonably represents the population of the State.

"(3) CHAIRPERSON.—The Governor shall designate a member of the council to serve as the chairperson of the council, or shall require the council to so designate such a member. Any member of the council who is a representative of the lead agency designated under section 635(a)(10) may not serve as the chairperson of the council.

"(b) COMPOSITION.—

"(1) IN GENERAL.—The council shall be composed as follows:

639(a)(8)-
641(b)(1)

"(A) Parents.—At least 20 percent of the members shall be parents of infants or toddlers with disabilities or children with disabilities aged 12 or younger, with knowledge of, or experience with, programs for infants and toddlers with disabilities. At least one such member shall be a parent of an infant or toddler with a disability or a child with a disability aged 6 or younger.

"(B) Service providers.—At least 20 percent of the members shall be public or private providers of early intervention services.

"(C) State legislature.—At least one member shall be from the State legislature.

"(D) Personnel preparation.—At least one member shall be involved in personnel preparation.

"(E) Agency for early intervention services.—At least one member shall be from each of the State agencies involved in the provision of, or payment for, early intervention services to infants and toddlers with disabilities and their families and shall have sufficient authority to engage in policy planning and implementation on behalf of such agencies.

"(F) Agency for preschool services.—At least one member shall be from the State educational agency responsible for preschool services to children with disabilities and shall have sufficient authority to engage in policy planning and implementation on behalf of such agency.

"(G) Agency for health insurance.—At least one member shall be from the agency responsible for the State governance of health insurance.

"(H) Head Start agency.—At least one representative from a Head Start agency or program in the State.

"(I) Child care agency.—At least one representative from a State agency responsible for child care.

"(2) Other members.—The council may include other members selected by the Governor, including a representative from the Bureau of Indian Affairs, or where there is no BIA-operated or BIA-funded school, from the Indian Health Service or the tribe or tribal council.

"(c) Meetings.—The council shall meet at least quarterly and in such places as it deems necessary. The meetings shall be publicly announced, and, to the extent appropriate, open and accessible to the general public.

"(d) Management Authority.—Subject to the approval of the Governor, the council may prepare and approve a budget using funds under this part to conduct hearings and forums, to reimburse members of the council for reasonable and necessary expenses for attending council meetings and performing council duties (including child care for parent representatives), to pay compensation to a member of the council if the member is not employed or must forfeit wages from other employment when performing official council business, to hire staff, and to obtain the services of such professional, technical, and clerical personnel as may be necessary to carry out its functions under this part.

"(e) Functions of Council.—

"(1) Duties.—The council shall—

"(A) advise and assist the lead agency designated or established under section 635(a)(10) in the performance

641(b)(1)(A) -
(e)(1)(A)

of the responsibilities set forth in such section, particularly the identification of the sources of fiscal and other support for services for early intervention programs, assignment of financial responsibility to the appropriate agency, and the promotion of the interagency agreements;

"(B) advise and assist the lead agency in the preparation of applications and amendments thereto;

"(C) advise and assist the State educational agency regarding the transition of toddlers with disabilities to preschool and other appropriate services; and

"(D) prepare and submit an annual report to the Governor and to the Secretary on the status of early intervention programs for infants and toddlers with disabilities and their families operated within the State.

"(2) AUTHORIZED ACTIVITY.—The council may advise and assist the lead agency and the State educational agency regarding the provision of appropriate services for children from birth through age 5. The council may advise appropriate agencies in the State with respect to the integration of services for infants and toddlers with disabilities and at-risk infants and toddlers and their families, regardless of whether at-risk infants and toddlers are eligible for early intervention services in the State.

"(f) CONFLICT OF INTEREST.—No member of the council shall cast a vote on any matter that would provide direct financial benefit to that member or otherwise give the appearance of a conflict of interest under State law.

"SEC. 642. FEDERAL ADMINISTRATION.

"Sections 616, 617, and 618 shall, to the extent not inconsistent with this part, apply to the program authorized by this part, except that—

"(1) any reference in such sections to a State educational agency shall be considered to be a reference to a State's lead agency established or designated under section 635(a)(10);

"(2) any reference in such sections to a local educational agency, educational service agency, or a State agency shall be considered to be a reference to an early intervention service provider under this part; and

"(3) any reference to the education of children with disabilities or the education of all children with disabilities shall be considered to be a reference to the provision of appropriate early intervention services to infants and toddlers with disabilities.

"SEC. 643. ALLOCATION OF FUNDS.

"(a) RESERVATION OF FUNDS FOR OUTLYING AREAS.—

"(1) IN GENERAL.—From the sums appropriated to carry out this part for any fiscal year, the Secretary may reserve up to one percent for payments to Guam, American Samoa, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands in accordance with their respective needs.

"(2) CONSOLIDATION OF FUNDS.—The provisions of Public Law 95–134, permitting the consolidation of grants to the outlying areas, shall not apply to funds those areas receive under this part.

"(b) PAYMENTS TO INDIANS.—

641(e)(1)(B)-
643(b)

"(1) In general.—The Secretary shall, subject to this subsection, make payments to the Secretary of the Interior to be distributed to tribes, tribal organizations (as defined under section 4 of the Indian Self-Determination and Education Assistance Act), or consortia of the above entities for the coordination of assistance in the provision of early intervention services by the States to infants and toddlers with disabilities and their families on reservations served by elementary and secondary schools for Indian children operated or funded by the Department of the Interior. The amount of such payment for any fiscal year shall be 1.25 percent of the aggregate of the amount available to all States under this part for such fiscal year.

"(2) Allocation.—For each fiscal year, the Secretary of the Interior shall distribute the entire payment received under paragraph (1) by providing to each tribe, tribal organization, or consortium an amount based on the number of infants and toddlers residing on the reservation, as determined annually, divided by the total of such children served by all tribes, tribal organizations, or consortia.

"(3) Information.—To receive a payment under this subsection, the tribe, tribal organization, or consortium shall submit such information to the Secretary of the Interior as is needed to determine the amounts to be distributed under paragraph (2).

"(4) Use of funds.—The funds received by a tribe, tribal organization, or consortium shall be used to assist States in child find, screening, and other procedures for the early identification of Indian children under 3 years of age and for parent training. Such funds may also be used to provide early intervention services in accordance with this part. Such activities may be carried out directly or through contracts or cooperative agreements with the BIA, local educational agencies, and other public or private nonprofit organizations. The tribe, tribal organization, or consortium is encouraged to involve Indian parents in the development and implementation of these activities. The above entities shall, as appropriate, make referrals to local, State, or Federal entities for the provision of services or further diagnosis.

"(5) Reports.—To be eligible to receive a grant under paragraph (2), a tribe, tribal organization, or consortium shall make a biennial report to the Secretary of the Interior of activities undertaken under this subsection, including the number of contracts and cooperative agreements entered into, the number of children contacted and receiving services for each year, and the estimated number of children needing services during the 2 years following the year in which the report is made. The Secretary of the Interior shall include a summary of this information on a biennial basis to the Secretary of Education along with such other information as required under section 611(i)(3)(E). The Secretary of Education may require any additional information from the Secretary of the Interior.

"(6) Prohibited uses of funds.—None of the funds under this subsection may be used by the Secretary of the Interior for administrative purposes, including child count, and the provision of technical assistance.

"(c) State Allotments.—

643(b)(1)-
(c)

BEST COPY AVAILABLE

"(1) In general.—Except as provided in paragraphs (2), (3), and (4), from the funds remaining for each fiscal year after the reservation and payments under subsections (a) and (b), the Secretary shall first allot to each State an amount that bears the same ratio to the amount of such remainder as the number of infants and toddlers in the State bears to the number of infants and toddlers in all States.

"(2) Minimum allotments.—Except as provided in paragraphs (3) and (4), no State shall receive an amount under this section for any fiscal year that is less than the greatest of—

"(A) one-half of one percent of the remaining amount described in paragraph (1); or

"(B) $500,000.

"(3) Special rule for 1998 and 1999.—

"(A) In general.—Except as provided in paragraph (4), no State may receive an amount under this section for either fiscal year 1998 or 1999 that is less than the sum of the amounts such State received for fiscal year 1994 under—

"(i) part H (as in effect for such fiscal year); and

"(ii) subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 (as in effect on the day before the date of the enactment of the Improving America's Schools Act of 1994) for children with disabilities under 3 years of age.

"(B) Exception.—If, for fiscal year 1998 or 1999, the number of infants and toddlers in a State, as determined under paragraph (1), is less than the number of infants and toddlers so determined for fiscal year 1994, the amount determined under subparagraph (A) for the State shall be reduced by the same percentage by which the number of such infants and toddlers so declined.

"(4) Ratable reduction.—

"(A) In general.—If the sums made available under this part for any fiscal year are insufficient to pay the full amounts that all States are eligible to receive under this subsection for such year, the Secretary shall ratably reduce the allotments to such States for such year.

"(B) Additional funds.—If additional funds become available for making payments under this subsection for a fiscal year, allotments that were reduced under subparagraph (A) shall be increased on the same basis they were reduced.

"(5) Definitions.—For the purpose of this subsection—

"(A) the terms 'infants' and 'toddlers' mean children under 3 years of age; and

"(B) the term 'State' means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

"(d) Reallotment of Funds.—If a State elects not to receive its allotment under subsection (c), the Secretary shall reallot, among the remaining States, amounts from such State in accordance with such subsection.

643(c)(1)-(d)

"SEC. 644. FEDERAL INTERAGENCY COORDINATING COUNCIL.

"(a) ESTABLISHMENT AND PURPOSE.—

"(1) IN GENERAL.—The Secretary shall establish a Federal Interagency Coordinating Council in order to—

"(A) minimize duplication of programs and activities across Federal, State, and local agencies, relating to—

"(i) early intervention services for infants and toddlers with disabilities (including at-risk infants and toddlers) and their families; and

"(ii) preschool or other appropriate services for children with disabilities;

"(B) ensure the effective coordination of Federal early intervention and preschool programs and policies across Federal agencies;

"(C) coordinate the provision of Federal technical assistance and support activities to States;

"(D) identify gaps in Federal agency programs and services; and

"(E) identify barriers to Federal interagency cooperation.

"(2) APPOINTMENTS.—The council established under paragraph (1) (hereafter in this section referred to as the 'Council') and the chairperson of the Council shall be appointed by the Secretary in consultation with other appropriate Federal agencies. In making the appointments, the Secretary shall ensure that each member has sufficient authority to engage in policy planning and implementation on behalf of the department, agency, or program that the member represents.

"(b) COMPOSITION.—The Council shall be composed of—

"(1) a representative of the Office of Special Education Programs;

"(2) a representative of the National Institute on Disability and Rehabilitation Research and a representative of the Office of Educational Research and Improvement;

"(3) a representative of the Maternal and Child Health Services Block Grant Program;

"(4) a representative of programs administered under the Developmental Disabilities Assistance and Bill of Rights Act;

"(5) a representative of the Health Care Financing Administration;

"(6) a representative of the Division of Birth Defects and Developmental Disabilities of the Centers for Disease Control;

"(7) a representative of the Social Security Administration;

"(8) a representative of the special supplemental nutrition program for women, infants, and children of the Department of Agriculture;

"(9) a representative of the National Institute of Mental Health;

"(10) a representative of the National Institute of Child Health and Human Development;

"(11) a representative of the Bureau of Indian Affairs of the Department of the Interior;

"(12) a representative of the Indian Health Service;

"(13) a representative of the Surgeon General;

"(14) a representative of the Department of Defense;

644(a)-
(b)(14)

BEST COPY AVAILABLE

"(15) a representative of the Children's Bureau, and a representative of the Head Start Bureau, of the Administration for Children and Families;

"(16) a representative of the Substance Abuse and Mental Health Services Administration;

"(17) a representative of the Pediatric AIDS Health Care Demonstration Program in the Public Health Service;

"(18) parents of children with disabilities age 12 or under (who shall constitute at least 20 percent of the members of the Council), of whom at least one must have a child with a disability under the age of 6;

"(19) at least two representatives of State lead agencies for early intervention services to infants and toddlers, one of whom must be a representative of a State educational agency and the other a representative of a non-educational agency;

"(20) other members representing appropriate agencies involved in the provision of, or payment for, early intervention services and special education and related services to infants and toddlers with disabilities and their families and preschool children with disabilities; and

"(21) other persons appointed by the Secretary.

"(c) MEETINGS.—The Council shall meet at least quarterly and in such places as the Council deems necessary. The meetings shall be publicly announced, and, to the extent appropriate, open and accessible to the general public.

"(d) FUNCTIONS OF THE COUNCIL.—The Council shall—

"(1) advise and assist the Secretary of Education, the Secretary of Health and Human Services, the Secretary of Defense, the Secretary of the Interior, the Secretary of Agriculture, and the Commissioner of Social Security in the performance of their responsibilities related to serving children from birth through age 5 who are eligible for services under this part or under part B;

"(2) conduct policy analyses of Federal programs related to the provision of early intervention services and special educational and related services to infants and toddlers with disabilities and their families, and preschool children with disabilities, in order to determine areas of conflict, overlap, duplication, or inappropriate omission;

"(3) identify strategies to address issues described in paragraph (2);

"(4) develop and recommend joint policy memoranda concerning effective interagency collaboration, including modifications to regulations, and the elimination of barriers to interagency programs and activities;

"(5) coordinate technical assistance and disseminate information on best practices, effective program coordination strategies, and recommendations for improved early intervention programming for infants and toddlers with disabilities and their families and preschool children with disabilities; and

"(6) facilitate activities in support of States' interagency coordination efforts.

"(e) CONFLICT OF INTEREST.—No member of the Council shall cast a vote on any matter that would provide direct financial benefit to that member or otherwise give the appearance of a conflict of interest under Federal law.

644(b)(15)-
(e)

"(f) FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the establishment or operation of the Council.

"SEC. 645. AUTHORIZATION OF APPROPRIATIONS.

"For the purpose of carrying out this part, there are authorized to be appropriated $400,000,000 for fiscal year 1998 and such sums as may be necessary for each of the fiscal years 1999 through 2002.

"PART D—NATIONAL ACTIVITIES TO IMPROVE EDUCATION OF CHILDREN WITH DISABILITIES

"Subpart 1—State Program Improvement Grants for Children with Disabilities

"SEC. 651. FINDINGS AND PURPOSE.

"(a) FINDINGS.—The Congress finds the following:

"(1) States are responding with some success to multiple pressures to improve educational and transitional services and results for children with disabilities in response to growing demands imposed by ever-changing factors, such as demographics, social policies, and labor and economic markets.

"(2) In order for States to address such demands and to facilitate lasting systemic change that is of benefit to all students, including children with disabilities, States must involve local educational agencies, parents, individuals with disabilities and their families, teachers and other service providers, and other interested individuals and organizations in carrying out comprehensive strategies to improve educational results for children with disabilities.

"(3) Targeted Federal financial resources are needed to assist States, working in partnership with others, to identify and make needed changes to address the needs of children with disabilities into the next century.

"(4) State educational agencies, in partnership with local educational agencies and other individuals and organizations, are in the best position to identify and design ways to meet emerging and expanding demands to improve education for children with disabilities and to address their special needs.

"(5) Research, demonstration, and practice over the past 20 years in special education and related disciplines have built a foundation of knowledge on which State and local systemic-change activities can now be based.

"(6) Such research, demonstration, and practice in special education and related disciplines have demonstrated that an effective educational system now and in the future must—

"(A) maintain high academic standards and clear performance goals for children with disabilities, consistent with the standards and expectations for all students in the educational system, and provide for appropriate and effective strategies and methods to ensure that students who are children with disabilities have maximum opportunities to achieve those standards and goals;

"(B) create a system that fully addresses the needs of all students, including children with disabilities, by

BEST COPY AVAILABLE

644(f) -
651(a)(6)(B)

addressing the needs of children with disabilities in carrying out educational reform activities;

"(C) clearly define, in measurable terms, the school and post-school results that children with disabilities are expected to achieve;

"(D) promote service integration, and the coordination of State and local education, social, health, mental health, and other services, in addressing the full range of student needs, particularly the needs of children with disabilities who require significant levels of support to maximize their participation and learning in school and the community;

"(E) ensure that children with disabilities are provided assistance and support in making transitions as described in section 674(b)(3)(C);

"(F) promote comprehensive programs of professional development to ensure that the persons responsible for the education or a transition of children with disabilities possess the skills and knowledge necessary to address the educational and related needs of those children;

"(G) disseminate to teachers and other personnel serving children with disabilities research-based knowledge about successful teaching practices and models and provide technical assistance to local educational agencies and schools on how to improve results for children with disabilities;

"(H) create school-based disciplinary strategies that will be used to reduce or eliminate the need to use suspension and expulsion as disciplinary options for children with disabilities;

"(I) establish placement-neutral funding formulas and cost-effective strategies for meeting the needs of children with disabilities; and

"(J) involve individuals with disabilities and parents of children with disabilities in planning, implementing, and evaluating systemic-change activities and educational reforms.

"(b) PURPOSE.—The purpose of this subpart is to assist State educational agencies, and their partners referred to in section 652(b), in reforming and improving their systems for providing educational, early intervention, and transitional services, including their systems for professional development, technical assistance, and dissemination of knowledge about best practices, to improve results for children with disabilities.

"SEC. 652. ELIGIBILITY AND COLLABORATIVE PROCESS.

"(a) ELIGIBLE APPLICANTS.—A State educational agency may apply for a grant under this subpart for a grant period of not less than 1 year and not more than 5 years.

"(b) PARTNERS.—

"(1) REQUIRED PARTNERS.—

"(A) CONTRACTUAL PARTNERS.—In order to be considered for a grant under this subpart, a State educational agency shall establish a partnership with local educational agencies and other State agencies involved in, or concerned with, the education of children with disabilities.

"(B) OTHER PARTNERS.—In order to be considered for a grant under this subpart, a State educational agency

651(a)(6)(C) -
652(b)(1)(B)

shall work in partnership with other persons and organizations involved in, and concerned with, the education of children with disabilities, including—

"(i) the Governor;

"(ii) parents of children with disabilities;

"(iii) parents of nondisabled children;

"(iv) individuals with disabilities;

"(v) organizations representing individuals with disabilities and their parents, such as parent training and information centers;

"(vi) community-based and other nonprofit organizations involved in the education and employment of individuals with disabilities;

"(vii) the lead State agency for part C;

"(viii) general and special education teachers, and early intervention personnel;

"(ix) the State advisory panel established under part C;

"(x) the State interagency coordinating council established under part C; and

"(xi) institutions of higher education within the State.

"(2) OPTIONAL PARTNERS.—A partnership under subparagraph (A) or (B) of paragraph (1) may also include—

"(A) individuals knowledgeable about vocational education;

"(B) the State agency for higher education;

"(C) the State vocational rehabilitation agency;

"(D) public agencies with jurisdiction in the areas of health, mental health, social services, and juvenile justice; and

"(E) other individuals.

"SEC. 653. APPLICATIONS.

"(a) IN GENERAL.—

"(1) SUBMISSION.—A State educational agency that desires to receive a grant under this subpart shall submit to the Secretary an application at such time, in such manner, and including such information as the Secretary may require.

"(2) STATE IMPROVEMENT PLAN.—The application shall include a State improvement plan that—

"(A) is integrated, to the maximum extent possible, with State plans under the Elementary and Secondary Education Act of 1965 and the Rehabilitation Act of 1973, as appropriate; and

"(B) meets the requirements of this section.

"(b) DETERMINING CHILD AND PROGRAM NEEDS.—

"(1) IN GENERAL.—Each State improvement plan shall identify those critical aspects of early intervention, general education, and special education programs (including professional development, based on an assessment of State and local needs) that must be improved to enable children with disabilities to meet the goals established by the State under section 612(a)(16).

"(2) REQUIRED ANALYSES.—To meet the requirement of paragraph (1), the State improvement plan shall include at least—

BEST COPY AVAILABLE

652(b)(1)(B)(i)
653(b)(2)

"(A) an analysis of all information, reasonably available to the State educational agency, on the performance of children with disabilities in the State, including—

"(i) their performance on State assessments and other performance indicators established for all children, including drop-out rates and graduation rates;

"(ii) their participation in postsecondary education and employment; and

"(iii) how their performance on the assessments and indicators described in clause (i) compares to that of non-disabled children;

"(B) an analysis of State and local needs for professional development for personnel to serve children with disabilities that includes, at a minimum—

"(i) the number of personnel providing special education and related services; and

"(ii) relevant information on current and anticipated personnel vacancies and shortages (including the number of individuals described in clause (i) with temporary certification), and on the extent of certification or retraining necessary to eliminate such shortages, that is based, to the maximum extent possible, on existing assessments of personnel needs;

"(C) an analysis of the major findings of the Secretary's most recent reviews of State compliance, as they relate to improving results for children with disabilities; and

"(D) an analysis of other information, reasonably available to the State, on the effectiveness of the State's systems of early intervention, special education, and general education in meeting the needs of children with disabilities.

"(c) IMPROVEMENT STRATEGIES.—Each State improvement plan shall—

"(1) describe a partnership agreement that—

"(A) specifies—

"(i) the nature and extent of the partnership among the State educational agency, local educational agencies, and other State agencies involved in, or concerned with, the education of children with disabilities, and the respective roles of each member of the partnership; and

"(ii) how such agencies will work in partnership with other persons and organizations involved in, and concerned with, the education of children with disabilities, including the respective roles of each of these persons and organizations; and

"(B) is in effect for the period of the grant;

"(2) describe how grant funds will be used in undertaking the systemic-change activities, and the amount and nature of funds from any other sources, including part B funds retained for use at the State level under sections 611(f) and 619(d), that will be committed to the systemic-change activities;

"(3) describe the strategies the State will use to address the needs identified under subsection (b), including—

"(A) how the State will change State policies and procedures to address systemic barriers to improving results for children with disabilities;

653(b)(2)(A) -
(c)(3)(A)

"(B) how the State will hold local educational agencies and schools accountable for educational progress of children with disabilities;

"(C) how the State will provide technical assistance to local educational agencies and schools to improve results for children with disabilities;

"(D) how the State will address the identified needs for in-service and pre-service preparation to ensure that all personnel who work with children with disabilities (including both professional and paraprofessional personnel who provide special education, general education, related services, or early intervention services) have the skills and knowledge necessary to meet the needs of children with disabilities, including a description of how—

"(i) the State will prepare general and special education personnel with the content knowledge and collaborative skills needed to meet the needs of children with disabilities, including how the State will work with other States on common certification criteria;

"(ii) the State will prepare professionals and paraprofessionals in the area of early intervention with the content knowledge and collaborative skills needed to meet the needs of infants and toddlers with disabilities;

"(iii) the State will work with institutions of higher education and other entities that (on both a pre-service and an in-service basis) prepare personnel who work with children with disabilities to ensure that those institutions and entities develop the capacity to support quality professional development programs that meet State and local needs;

"(iv) the State will work to develop collaborative agreements with other States for the joint support and development of programs to prepare personnel for which there is not sufficient demand within a single State to justify support or development of such a program of preparation;

"(v) the State will work in collaboration with other States, particularly neighboring States, to address the lack of uniformity and reciprocity in the credentialing of teachers and other personnel;

"(vi) the State will enhance the ability of teachers and others to use strategies, such as behavioral interventions, to address the conduct of children with disabilities that impedes the learning of children with disabilities and others;

"(vii) the State will acquire and disseminate, to teachers, administrators, school board members, and related services personnel, significant knowledge derived from educational research and other sources, and how the State will, when appropriate, adopt promising practices, materials, and technology;

"(viii) the State will recruit, prepare, and retain qualified personnel, including personnel with disabilities and personnel from groups that are under-represented in the fields of regular education, special education, and related services;

653(c)(3)(B)-
(D)(viii)

BEST COPY AVAILABLE

"(ix) the plan is integrated, to the maximum extent possible, with other professional development plans and activities, including plans and activities developed and carried out under other Federal and State laws that address personnel recruitment and training; and

"(x) the State will provide for the joint training of parents and special education, related services, and general education personnel;

"(E) strategies that will address systemic problems identified in Federal compliance reviews, including shortages of qualified personnel;

"(F) how the State will disseminate results of the local capacity-building and improvement projects funded under section 611(f)(4);

"(G) how the State will address improving results for children with disabilities in the geographic areas of greatest need; and

"(H) how the State will assess, on a regular basis, the extent to which the strategies implemented under this subpart have been effective; and

"(4) describe how the improvement strategies described in paragraph (3) will be coordinated with public and private sector resources.

"(d) COMPETITIVE AWARDS.—

"(1) IN GENERAL.—The Secretary shall make grants under this subpart on a competitive basis.

"(2) PRIORITY.—The Secretary may give priority to applications on the basis of need, as indicated by such information as the findings of Federal compliance reviews.

"(e) PEER REVIEW.—

"(1) IN GENERAL.—The Secretary shall use a panel of experts who are competent, by virtue of their training, expertise, or experience, to evaluate applications under this subpart.

"(2) COMPOSITION OF PANEL.—A majority of a panel described in paragraph (1) shall be composed of individuals who are not employees of the Federal Government.

"(3) PAYMENT OF FEES AND EXPENSES OF CERTAIN MEMBERS.—The Secretary may use available funds appropriated to carry out this subpart to pay the expenses and fees of panel members who are not employees of the Federal Government.

"(f) REPORTING PROCEDURES.—Each State educational agency that receives a grant under this subpart shall submit performance reports to the Secretary pursuant to a schedule to be determined by the Secretary, but not more frequently than annually. The reports shall describe the progress of the State in meeting the performance goals established under section 612(a)(16), analyze the effectiveness of the State's strategies in meeting those goals, and identify any changes in the strategies needed to improve its performance.

"SEC. 654. USE OF FUNDS.

"(a) IN GENERAL.—

"(1) ACTIVITIES.—A State educational agency that receives a grant under this subpart may use the grant to carry out any activities that are described in the State's application and that are consistent with the purpose of this subpart.

652(c)(3)(D)(ix)
654(a)(1)

"(2) CONTRACTS AND SUBGRANTS.—Each such State educational agency—

"(A) shall, consistent with its partnership agreement under section 652(b), award contracts or subgrants to local educational agencies, institutions of higher education, and parent training and information centers, as appropriate, to carry out its State improvement plan under this subpart; and

"(B) may award contracts and subgrants to other public and private entities, including the lead agency under part C, to carry out such plan.

"(b) USE OF FUNDS FOR PROFESSIONAL DEVELOPMENT.—A State educational agency that receives a grant under this subpart—

"(1) shall use not less than 75 percent of the funds it receives under the grant for any fiscal year—

"(A) to ensure that there are sufficient regular education, special education, and related services personnel who have the skills and knowledge necessary to meet the needs of children with disabilities and developmental goals of young children; or

"(B) to work with other States on common certification criteria; or

"(2) shall use not less than 50 percent of such funds for such purposes, if the State demonstrates to the Secretary's satisfaction that it has the personnel described in paragraph (1)(A).

"(c) GRANTS TO OUTLYING AREAS.—Public Law 95–134, permitting the consolidation of grants to the outlying areas, shall not apply to funds received under this subpart.

"SEC. 655. MINIMUM STATE GRANT AMOUNTS.

"(a) IN GENERAL.—The Secretary shall make a grant to each State educational agency whose application the Secretary has selected for funding under this subpart in an amount for each fiscal year that is—

"(1) not less than $500,000, nor more than $2,000,000, in the case of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico; and

"(2) not less than $80,000, in the case of an outlying area.

"(b) INFLATION ADJUSTMENT.—Beginning with fiscal year 1999, the Secretary may increase the maximum amount described in subsection (a)(1) to account for inflation.

"(c) FACTORS.—The Secretary shall set the amount of each grant under subsection (a) after considering—

"(1) the amount of funds available for making the grants;

"(2) the relative population of the State or outlying area; and

"(3) the types of activities proposed by the State or outlying area.

"SEC. 656. AUTHORIZATION OF APPROPRIATIONS.

"There are authorized to be appropriated to carry out this subpart such sums as may be necessary for each of the fiscal years 1998 through 2002.

BEST COPY AVAILABLE

654(a)(2) –
656

"Subpart 2—Coordinated Research, Personnel Preparation, Technical Assistance, Support, and Dissemination of Information

"SEC. 661. ADMINISTRATIVE PROVISIONS.

"(a) Comprehensive Plan.—

"(1) In general.—The Secretary shall develop and implement a comprehensive plan for activities carried out under this subpart in order to enhance the provision of educational, related, transitional, and early intervention services to children with disabilities under parts B and C. The plan shall include mechanisms to address educational, related services, transitional, and early intervention needs identified by State educational agencies in applications submitted for State program improvement grants under subpart 1.

"(2) Participants in plan development.—In developing the plan described in paragraph (1), the Secretary shall consult with—

"(A) individuals with disabilities;

"(B) parents of children with disabilities;

"(C) appropriate professionals; and

"(D) representatives of State and local educational agencies, private schools, institutions of higher education, other Federal agencies, the National Council on Disability, and national organizations with an interest in, and expertise in, providing services to children with disabilities and their families.

"(3) Public comment.—The Secretary shall take public comment on the plan.

"(4) Distribution of funds.—In implementing the plan, the Secretary shall, to the extent appropriate, ensure that funds are awarded to recipients under this subpart to carry out activities that benefit, directly or indirectly, children with disabilities of all ages.

"(5) Reports to congress.—The Secretary shall periodically report to the Congress on the Secretary's activities under this subsection, including an initial report not later than the date that is 18 months after the date of the enactment of the Individuals with Disabilities Education Act Amendments of 1997.

"(b) Eligible Applicants.—

"(1) In general.—Except as otherwise provided in this subpart, the following entities are eligible to apply for a grant, contract, or cooperative agreement under this subpart:

"(A) A State educational agency.

"(B) A local educational agency.

"(C) An institution of higher education.

"(D) Any other public agency.

"(E) A private nonprofit organization.

"(F) An outlying area.

"(G) An Indian tribe or a tribal organization (as defined under section 4 of the Indian Self-Determination and Education Assistance Act).

661(a)-
(b)(1)(G)

"(H) A for-profit organization, if the Secretary finds it appropriate in light of the purposes of a particular competition for a grant, contract, or cooperative agreement under this subpart.

"(2) SPECIAL RULE.—The Secretary may limit the entities eligible for an award of a grant, contract, or cooperative agreement to one or more categories of eligible entities described in paragraph (1).

"(c) USE OF FUNDS BY SECRETARY.—Notwithstanding any other provision of law, and in addition to any authority granted the Secretary under chapter 1 or chapter 2, the Secretary may use up to 20 percent of the funds available under either chapter 1 or chapter 2 for any fiscal year to carry out any activity, or combination of activities, subject to such conditions as the Secretary determines are appropriate effectively to carry out the purposes of such chapters, that—

"(1) is consistent with the purposes of chapter 1, chapter 2, or both; and

"(2) involves—

"(A) research;

"(B) personnel preparation;

"(C) parent training and information;

"(D) technical assistance and dissemination;

"(E) technology development, demonstration, and utilization; or

"(F) media services.

"(d) SPECIAL POPULATIONS.—

"(1) APPLICATION REQUIREMENT.—In making an award of a grant, contract, or cooperative agreement under this subpart, the Secretary shall, as appropriate, require an applicant to demonstrate how the applicant will address the needs of children with disabilities from minority backgrounds.

"(2) OUTREACH AND TECHNICAL ASSISTANCE.—

"(A) REQUIREMENT.—Notwithstanding any other provision of this Act, the Secretary shall ensure that at least one percent of the total amount of funds appropriated to carry out this subpart is used for either or both of the following activities:

"(i) To provide outreach and technical assistance to Historically Black Colleges and Universities, and to institutions of higher education with minority enrollments of at least 25 percent, to promote the participation of such colleges, universities, and institutions in activities under this subpart.

"(ii) To enable Historically Black Colleges and Universities, and the institutions described in clause (i), to assist other colleges, universities, institutions, and agencies in improving educational and transitional results for children with disabilities.

"(B) RESERVATION OF FUNDS.—The Secretary may reserve funds appropriated under this subpart to satisfy the requirement of subparagraph (A).

"(e) PRIORITIES.—

"(1) IN GENERAL.—Except as otherwise explicitly authorized in this subpart, the Secretary shall ensure that a grant, contract, or cooperative agreement under chapter 1 or 2 is awarded only—

BEST COPY AVAILABLE

661(b)(1)(H)-
(e)(1)

"(A) for activities that are designed to benefit children with disabilities, their families, or the personnel employed to work with such children or their families; or

"(B) to benefit other individuals with disabilities that such chapter is intended to benefit.

"(2) PRIORITY FOR PARTICULAR ACTIVITIES.—Subject to paragraph (1), the Secretary, in making an award of a grant, contract, or cooperative agreement under this subpart, may, without regard to the rule making procedures under section 553 of title 5, United States Code, limit competitions to, or otherwise give priority to—

"(A) projects that address one or more—

"(i) age ranges;

"(ii) disabilities;

"(iii) school grades;

"(iv) types of educational placements or early intervention environments;

"(v) types of services;

"(vi) content areas, such as reading; or

"(vii) effective strategies for helping children with disabilities learn appropriate behavior in the school and other community-based educational settings;

"(B) projects that address the needs of children based on the severity of their disability;

"(C) projects that address the needs of—

"(i) low-achieving students;

"(ii) underserved populations;

"(iii) children from low-income families;

"(iv) children with limited English proficiency;

"(v) unserved and underserved areas;

"(vi) particular types of geographic areas; or

"(vii) children whose behavior interferes with their learning and socialization;

"(D) projects to reduce inappropriate identification of children as children with disabilities, particularly among minority children;

"(E) projects that are carried out in particular areas of the country, to ensure broad geographic coverage; and

"(F) any activity that is expressly authorized in chapter 1 or 2.

"(f) APPLICANT AND RECIPIENT RESPONSIBILITIES.—

"(1) DEVELOPMENT AND ASSESSMENT OF PROJECTS.—The Secretary shall require that an applicant for, and a recipient of, a grant, contract, or cooperative agreement for a project under this subpart—

"(A) involve individuals with disabilities or parents of individuals with disabilities in planning, implementing, and evaluating the project; and

"(B) where appropriate, determine whether the project has any potential for replication and adoption by other entities.

"(2) ADDITIONAL RESPONSIBILITIES.—The Secretary may require a recipient of a grant, contract, or cooperative agreement for a project under this subpart—

"(A) to share in the cost of the project;

"(B) to prepare the research and evaluation findings and products from the project in formats that are useful

661(e)(1)(A)-
(f)(2)(B)

for specific audiences, including parents, administrators, teachers, early intervention personnel, related services personnel, and individuals with disabilities;

“(C) to disseminate such findings and products; and

“(D) to collaborate with other such recipients in carrying out subparagraphs (B) and (C).

“(g) Application Management.—

“(1) Standing panel.—

“(A) In general.—The Secretary shall establish and use a standing panel of experts who are competent, by virtue of their training, expertise, or experience, to evaluate applications under this subpart that, individually, request more than $75,000 per year in Federal financial assistance.

“(B) Membership.—The standing panel shall include, at a minimum—

“(i) individuals who are representatives of institutions of higher education that plan, develop, and carry out programs of personnel preparation;

“(ii) individuals who design and carry out programs of research targeted to the improvement of special education programs and services;

“(iii) individuals who have recognized experience and knowledge necessary to integrate and apply research findings to improve educational and transitional results for children with disabilities;

“(iv) individuals who administer programs at the State or local level in which children with disabilities participate;

“(v) individuals who prepare parents of children with disabilities to participate in making decisions about the education of their children;

“(vi) individuals who establish policies that affect the delivery of services to children with disabilities;

“(vii) individuals who are parents of children with disabilities who are benefiting, or have benefited, from coordinated research, personnel preparation, and technical assistance; and

“(viii) individuals with disabilities.

“(C) Training.—The Secretary shall provide training to the individuals who are selected as members of the standing panel under this paragraph.

“(D) Term.—No individual shall serve on the standing panel for more than 3 consecutive years, unless the Secretary determines that the individual's continued participation is necessary for the sound administration of this subpart.

“(2) Peer-review panels for particular competitions.—

“(A) Composition.—The Secretary shall ensure that each sub-panel selected from the standing panel that reviews applications under this subpart includes—

“(i) individuals with knowledge and expertise on the issues addressed by the activities authorized by the subpart; and

“(ii) to the extent practicable, parents of children with disabilities, individuals with disabilities, and persons from diverse backgrounds.

BEST COPY AVAILABLE

661(f)(2)(C)-
(g)(2)(A)

"(B) Federal employment limitation.—A majority of the individuals on each sub-panel that reviews an application under this subpart shall be individuals who are not employees of the Federal Government.

"(3) Use of discretionary funds for administrative purposes.—

"(A) Expenses and fees of non-federal panel members.—The Secretary may use funds available under this subpart to pay the expenses and fees of the panel members who are not officers or employees of the Federal Government.

"(B) Administrative support.—The Secretary may use not more than 1 percent of the funds appropriated to carry out this subpart to pay non-Federal entities for administrative support related to management of applications submitted under this subpart.

"(C) Monitoring.—The Secretary may use funds available under this subpart to pay the expenses of Federal employees to conduct on-site monitoring of projects receiving $500,000 or more for any fiscal year under this subpart.

"(h) Program Evaluation.—The Secretary may use funds appropriated to carry out this subpart to evaluate activities carried out under the subpart.

"(i) Minimum Funding Required.—

"(1) In general.—Subject to paragraph (2), the Secretary shall ensure that, for each fiscal year, at least the following amounts are provided under this subpart to address the following needs:

"(A) $12,832,000 to address the educational, related services, transitional, and early intervention needs of children with deaf-blindness.

"(B) $4,000,000 to address the postsecondary, vocational, technical, continuing, and adult education needs of individuals with deafness.

"(C) $4,000,000 to address the educational, related services, and transitional needs of children with an emotional disturbance and those who are at risk of developing an emotional disturbance.

"(2) Ratable reduction.—If the total amount appropriated to carry out sections 672, 673, and 685 for any fiscal year is less than $130,000,000, the amounts listed in paragraph (1) shall be ratably reduced.

"(j) Eligibility for Financial Assistance.—Effective for fiscal years for which the Secretary may make grants under section 619(b), no State or local educational agency or educational service agency or other public institution or agency may receive a grant under this subpart which relates exclusively to programs, projects, and activities pertaining to children aged 3 through 5, inclusive, unless the State is eligible to receive a grant under section 619(b).

661(g)(2)(B)-
(j)

"Chapter 1—Improving Early Intervention, Educational, and Transitional Services and Results for Children with Disabilities through Coordinated Research and Personnel Preparation

"SEC. 671. FINDINGS AND PURPOSE.

"(a) FINDINGS.—The Congress finds the following:

"(1) The Federal Government has an ongoing obligation to support programs, projects, and activities that contribute to positive results for children with disabilities, enabling them—

"(A) to meet their early intervention, educational, and transitional goals and, to the maximum extent possible, educational standards that have been established for all children; and

"(B) to acquire the skills that will empower them to lead productive and independent adult lives.

"(2)(A) As a result of more than 20 years of Federal support for research, demonstration projects, and personnel preparation, there is an important knowledge base for improving results for children with disabilities.

"(B) Such knowledge should be used by States and local educational agencies to design and implement state-of-the-art educational systems that consider the needs of, and include, children with disabilities, especially in environments in which they can learn along with their peers and achieve results measured by the same standards as the results of their peers.

"(3)(A) Continued Federal support is essential for the development and maintenance of a coordinated and high-quality program of research, demonstration projects, dissemination of information, and personnel preparation.

"(B) Such support—

"(i) enables State educational agencies and local educational agencies to improve their educational systems and results for children with disabilities;

"(ii) enables State and local agencies to improve early intervention services and results for infants and toddlers with disabilities and their families; and

"(iii) enhances the opportunities for general and special education personnel, related services personnel, parents, and paraprofessionals to participate in pre-service and in-service training, to collaborate, and to improve results for children with disabilities and their families.

"(4) The Federal Government plays a critical role in facilitating the availability of an adequate number of qualified personnel—

"(A) to serve effectively the over 5,000,000 children with disabilities;

"(B) to assume leadership positions in administrative and direct-service capacities related to teacher training and research concerning the provision of early intervention services, special education, and related services; and

"(C) to work with children with low-incidence disabilities and their families.

"(5) The Federal Government performs the role described in paragraph (4)—

671(a)(1)-(5)

BEST COPY AVAILABLE

"(A) by supporting models of personnel development that reflect successful practice, including strategies for recruiting, preparing, and retaining personnel;

"(B) by promoting the coordination and integration of—

"(i) personnel-development activities for teachers of children with disabilities; and

"(ii) other personnel-development activities supported under Federal law, including this chapter;

"(C) by supporting the development and dissemination of information about teaching standards; and

"(D) by promoting the coordination and integration of personnel-development activities through linkage with systemic-change activities within States and nationally.

"(b) PURPOSE.—The purpose of this chapter is to provide Federal funding for coordinated research, demonstration projects, outreach, and personnel-preparation activities that—

"(1) are described in sections 672 through 674;

"(2) are linked with, and promote, systemic change; and

"(3) improve early intervention, educational, and transitional results for children with disabilities.

"SEC. 672. RESEARCH AND INNOVATION TO IMPROVE SERVICES AND RESULTS FOR CHILDREN WITH DISABILITIES.

"(a) IN GENERAL.—The Secretary shall make competitive grants to, or enter into contracts or cooperative agreements with, eligible entities to produce, and advance the use of, knowledge—

"(1) to improve—

"(A) services provided under this Act, including the practices of professionals and others involved in providing such services to children with disabilities; and

"(B) educational results for children with disabilities;

"(2) to address the special needs of preschool-aged children and infants and toddlers with disabilities, including infants and toddlers who would be at risk of having substantial developmental delays if early intervention services were not provided to them;

"(3) to address the specific problems of over-identification and under-identification of children with disabilities;

"(4) to develop and implement effective strategies for addressing inappropriate behavior of students with disabilities in schools, including strategies to prevent children with emotional and behavioral problems from developing emotional disturbances that require the provision of special education and related services;

"(5) to improve secondary and postsecondary education and transitional services for children with disabilities; and

"(6) to address the range of special education, related services, and early intervention needs of children with disabilities who need significant levels of support to maximize their participation and learning in school and in the community.

"(b) NEW KNOWLEDGE PRODUCTION; AUTHORIZED ACTIVITIES.—

"(1) IN GENERAL.—In carrying out this section, the Secretary shall support activities, consistent with the objectives described in subsection (a), that lead to the production of new knowledge.

671(a)(5)(A) -
672(b)(1)

"(2) AUTHORIZED ACTIVITIES.—Activities that may be carried out under this subsection include activities such as the following:

"(A) Expanding understanding of the relationships between learning characteristics of children with disabilities and the diverse ethnic, cultural, linguistic, social, and economic backgrounds of children with disabilities and their families.

"(B) Developing or identifying innovative, effective, and efficient curricula designs, instructional approaches, and strategies, and developing or identifying positive academic and social learning opportunities, that—

"(i) enable children with disabilities to make effective transitions described in section 674(b)(3)(C) or transitions between educational settings; and

"(ii) improve educational and transitional results for children with disabilities at all levels of the educational system in which the activities are carried out and, in particular, that improve the progress of the children, as measured by assessments within the general education curriculum involved.

"(C) Advancing the design of assessment tools and procedures that will accurately and efficiently determine the special instructional, learning, and behavioral needs of children with disabilities, especially within the context of general education.

"(D) Studying and promoting improved alignment and compatibility of general and special education reforms concerned with curricular and instructional reform, evaluation and accountability of such reforms, and administrative procedures.

"(E) Advancing the design, development, and integration of technology, assistive technology devices, media, and materials, to improve early intervention, educational, and transitional services and results for children with disabilities.

"(F) Improving designs, processes, and results of personnel preparation for personnel who provide services to children with disabilities through the acquisition of information on, and implementation of, research-based practices.

"(G) Advancing knowledge about the coordination of education with health and social services.

"(H) Producing information on the long-term impact of early intervention and education on results for individuals with disabilities through large-scale longitudinal studies.

"(c) INTEGRATION OF RESEARCH AND PRACTICE; AUTHORIZED ACTIVITIES.—

"(1) IN GENERAL.—In carrying out this section, the Secretary shall support activities, consistent with the objectives described in subsection (a), that integrate research and practice, including activities that support State systemic-change and local capacity-building and improvement efforts.

"(2) AUTHORIZED ACTIVITIES.—Activities that may be carried out under this subsection include activities such as the following:

BEST COPY AVAILABLE

672(b)(2)-
(c)(2)

"(A) Model demonstration projects to apply and test research findings in typical service settings to determine the usability, effectiveness, and general applicability of such research findings in such areas as improving instructional methods, curricula, and tools, such as textbooks and media.

"(B) Demonstrating and applying research-based findings to facilitate systemic changes, related to the provision of services to children with disabilities, in policy, procedure, practice, and the training and use of personnel.

"(C) Promoting and demonstrating the coordination of early intervention and educational services for children with disabilities with services provided by health, rehabilitation, and social service agencies.

"(D) Identifying and disseminating solutions that overcome systemic barriers to the effective and efficient delivery of early intervention, educational, and transitional services to children with disabilities.

"(d) Improving the Use of Professional Knowledge; Authorized Activities.—

"(1) In general.—In carrying out this section, the Secretary shall support activities, consistent with the objectives described in subsection (a), that improve the use of professional knowledge, including activities that support State systemic-change and local capacity-building and improvement efforts.

"(2) Authorized activities.—Activities that may be carried out under this subsection include activities such as the following:

"(A) Synthesizing useful research and other information relating to the provision of services to children with disabilities, including effective practices.

"(B) Analyzing professional knowledge bases to advance an understanding of the relationships, and the effectiveness of practices, relating to the provision of services to children with disabilities.

"(C) Ensuring that research and related products are in appropriate formats for distribution to teachers, parents, and individuals with disabilities.

"(D) Enabling professionals, parents of children with disabilities, and other persons, to learn about, and implement, the findings of research, and successful practices developed in model demonstration projects, relating to the provision of services to children with disabilities.

"(E) Conducting outreach, and disseminating information relating to successful approaches to overcoming systemic barriers to the effective and efficient delivery of early intervention, educational, and transitional services, to personnel who provide services to children with disabilities.

"(e) Balance Among Activities and Age Ranges.—In carrying out this section, the Secretary shall ensure that there is an appropriate balance—

"(1) among knowledge production, integration of research and practice, and use of professional knowledge; and

"(2) across all age ranges of children with disabilities.

"(f) Applications.—An eligible entity that wishes to receive a grant, or enter into a contract or cooperative agreement, under

672(c)(2)(A) -
(f)

this section shall submit an application to the Secretary at such time, in such manner, and containing such information as the Secretary may require.

"(g) Authorization of Appropriations.—There are authorized to be appropriated to carry out this section such sums as may be necessary for each of the fiscal years 1998 through 2002.

"SEC. 673. PERSONNEL PREPARATION TO IMPROVE SERVICES AND RESULTS FOR CHILDREN WITH DISABILITIES.

"(a) In General.—The Secretary shall, on a competitive basis, make grants to, or enter into contracts or cooperative agreements with, eligible entities—

"(1) to help address State-identified needs for qualified personnel in special education, related services, early intervention, and regular education, to work with children with disabilities; and

"(2) to ensure that those personnel have the skills and knowledge, derived from practices that have been determined, through research and experience, to be successful, that are needed to serve those children.

"(b) Low-Incidence Disabilities; Authorized Activities.—

"(1) In general.—In carrying out this section, the Secretary shall support activities, consistent with the objectives described in subsection (a), that benefit children with low-incidence disabilities.

"(2) Authorized activities.—Activities that may be carried out under this subsection include activities such as the following:

"(A) Preparing persons who—

"(i) have prior training in educational and other related service fields; and

"(ii) are studying to obtain degrees, certificates, or licensure that will enable them to assist children with disabilities to achieve the objectives set out in their individualized education programs described in section 614(d), or to assist infants and toddlers with disabilities to achieve the outcomes described in their individualized family service plans described in section 636.

"(B) Providing personnel from various disciplines with interdisciplinary training that will contribute to improvement in early intervention, educational, and transitional results for children with disabilities.

"(C) Preparing personnel in the innovative uses and application of technology to enhance learning by children with disabilities through early intervention, educational, and transitional services.

"(D) Preparing personnel who provide services to visually impaired or blind children to teach and use Braille in the provision of services to such children.

"(E) Preparing personnel to be qualified educational interpreters, to assist children with disabilities, particularly deaf and hard-of-hearing children in school and school-related activities and deaf and hard-of-hearing infants and toddlers and preschool children in early intervention and preschool programs.

BEST COPY AVAILABLE

672(g)-
673(b)(2)(E)

"(F) Preparing personnel who provide services to children with significant cognitive disabilities and children with multiple disabilities.

"(3) DEFINITION.—As used in this section, the term 'low-incidence disability' means—

"(A) a visual or hearing impairment, or simultaneous visual and hearing impairments;

"(B) a significant cognitive impairment; or

"(C) any impairment for which a small number of personnel with highly specialized skills and knowledge are needed in order for children with that impairment to receive early intervention services or a free appropriate public education.

"(4) SELECTION OF RECIPIENTS.—In selecting recipients under this subsection, the Secretary may give preference to applications that propose to prepare personnel in more than one low-incidence disability, such as deafness and blindness.

"(5) PREPARATION IN USE OF BRAILLE.—The Secretary shall ensure that all recipients of assistance under this subsection who will use that assistance to prepare personnel to provide services to visually impaired or blind children that can appropriately be provided in Braille will prepare those individuals to provide those services in Braille.

"(c) LEADERSHIP PREPARATION; AUTHORIZED ACTIVITIES.—

"(1) IN GENERAL.—In carrying out this section, the Secretary shall support leadership preparation activities that are consistent with the objectives described in subsection (a).

"(2) AUTHORIZED ACTIVITIES.—Activities that may be carried out under this subsection include activities such as the following:

"(A) Preparing personnel at the advanced graduate, doctoral, and postdoctoral levels of training to administer, enhance, or provide services for children with disabilities.

"(B) Providing interdisciplinary training for various types of leadership personnel, including teacher preparation faculty, administrators, researchers, supervisors, principals, and other persons whose work affects early intervention, educational, and transitional services for children with disabilities.

"(d) PROJECTS OF NATIONAL SIGNIFICANCE; AUTHORIZED ACTIVITIES.—

"(1) IN GENERAL.—In carrying out this section, the Secretary shall support activities, consistent with the objectives described in subsection (a), that are of national significance and have broad applicability.

"(2) AUTHORIZED ACTIVITIES.—Activities that may be carried out under this subsection include activities such as the following:

"(A) Developing and demonstrating effective and efficient practices for preparing personnel to provide services to children with disabilities, including practices that address any needs identified in the State's improvement plan under part C;

"(B) Demonstrating the application of significant knowledge derived from research and other sources in the development of programs to prepare personnel to provide services to children with disabilities.

673(b)(2)(F)-
(d)(2)(B)

"(C) Demonstrating models for the preparation of, and interdisciplinary training of, early intervention, special education, and general education personnel, to enable the personnel—

"(i) to acquire the collaboration skills necessary to work within teams to assist children with disabilities; and

"(ii) to achieve results that meet challenging standards, particularly within the general education curriculum.

"(D) Demonstrating models that reduce shortages of teachers, and personnel from other relevant disciplines, who serve children with disabilities, through reciprocity arrangements between States that are related to licensure and certification.

"(E) Developing, evaluating, and disseminating model teaching standards for persons working with children with disabilities.

"(F) Promoting the transferability, across State and local jurisdictions, of licensure and certification of teachers and administrators working with such children.

"(G) Developing and disseminating models that prepare teachers with strategies, including behavioral interventions, for addressing the conduct of children with disabilities that impedes their learning and that of others in the classroom.

"(H) Institutes that provide professional development that addresses the needs of children with disabilities to teachers or teams of teachers, and where appropriate, to school board members, administrators, principals, pupil-service personnel, and other staff from individual schools.

"(I) Projects to improve the ability of general education teachers, principals, and other administrators to meet the needs of children with disabilities.

"(J) Developing, evaluating, and disseminating innovative models for the recruitment, induction, retention, and assessment of new, qualified teachers, especially from groups that are underrepresented in the teaching profession, including individuals with disabilities.

"(K) Supporting institutions of higher education with minority enrollments of at least 25 percent for the purpose of preparing personnel to work with children with disabilities.

"(e) HIGH-INCIDENCE DISABILITIES; AUTHORIZED ACTIVITIES.—

"(1) IN GENERAL.—In carrying out this section, the Secretary shall support activities, consistent with the objectives described in subsection (a), to benefit children with high-incidence disabilities, such as children with specific learning disabilities, speech or language impairment, or mental retardation.

"(2) AUTHORIZED ACTIVITIES.—Activities that may be carried out under this subsection include the following:

"(A) Activities undertaken by institutions of higher education, local educational agencies, and other local entities—

"(i) to improve and reform their existing programs to prepare teachers and related services personnel—

673(d)(2)(C) -
(e)(2)(A)(i)

BEST COPY AVAILABLE

"(I) to meet the diverse needs of children with disabilities for early intervention, educational, and transitional services; and

"(II) to work collaboratively in regular classroom settings; and

"(ii) to incorporate best practices and research-based knowledge about preparing personnel so they will have the knowledge and skills to improve educational results for children with disabilities.

"(B) Activities incorporating innovative strategies to recruit and prepare teachers and other personnel to meet the needs of areas in which there are acute and persistent shortages of personnel.

"(C) Developing career opportunities for paraprofessionals to receive training as special education teachers, related services personnel, and early intervention personnel, including interdisciplinary training to enable them to improve early intervention, educational, and transitional results for children with disabilities.

"(f) APPLICATIONS.—

"(1) IN GENERAL.—Any eligible entity that wishes to receive a grant, or enter into a contract or cooperative agreement, under this section shall submit an application to the Secretary at such time, in such manner, and containing such information as the Secretary may require.

"(2) IDENTIFIED STATE NEEDS.—

"(A) REQUIREMENT TO ADDRESS IDENTIFIED NEEDS.—Any application under subsection (b), (c), or (e) shall include information demonstrating to the satisfaction of the Secretary that the activities described in the application will address needs identified by the State or States the applicant proposes to serve.

"(B) COOPERATION WITH STATE EDUCATIONAL AGENCIES.—Any applicant that is not a local educational agency or a State educational agency shall include information demonstrating to the satisfaction of the Secretary that the applicant and one or more State educational agencies have engaged in a cooperative effort to plan the project to which the application pertains, and will cooperate in carrying out and monitoring the project.

"(3) ACCEPTANCE BY STATES OF PERSONNEL PREPARATION REQUIREMENTS.—The Secretary may require applicants to provide letters from one or more States stating that the States—

"(A) intend to accept successful completion of the proposed personnel preparation program as meeting State personnel standards for serving children with disabilities or serving infants and toddlers with disabilities; and

"(B) need personnel in the area or areas in which the applicant proposes to provide preparation, as identified in the States' comprehensive systems of personnel development under parts B and C.

"(g) SELECTION OF RECIPIENTS.—

"(1) IMPACT OF PROJECT.—In selecting recipients under this section, the Secretary may consider the impact of the project proposed in the application in meeting the need for personnel identified by the States.

673(e)(2)(A)(i)(I)-
(g)(1)

"(2) REQUIREMENT ON APPLICANTS TO MEET STATE AND PROFESSIONAL STANDARDS.—The Secretary shall make grants under this section only to eligible applicants that meet State and professionally-recognized standards for the preparation of special education and related services personnel, if the purpose of the project is to assist personnel in obtaining degrees.

"(3) PREFERENCES.—In selecting recipients under this section, the Secretary may—

"(A) give preference to institutions of higher education that are educating regular education personnel to meet the needs of children with disabilities in integrated settings and educating special education personnel to work in collaboration with regular educators in integrated settings; and

"(B) give preference to institutions of higher education that are successfully recruiting and preparing individuals with disabilities and individuals from groups that are underrepresented in the profession for which they are preparing individuals.

"(h) SERVICE OBLIGATION.—

"(1) IN GENERAL.—Each application for funds under subsections (b) and (e), and to the extent appropriate subsection (d), shall include an assurance that the applicant will ensure that individuals who receive a scholarship under the proposed project will subsequently provide special education and related services to children with disabilities for a period of 2 years for every year for which assistance was received or repay all or part of the cost of that assistance, in accordance with regulations issued by the Secretary.

"(2) LEADERSHIP PREPARATION.—Each application for funds under subsection (c) shall include an assurance that the applicant will ensure that individuals who receive a scholarship under the proposed project will subsequently perform work related to their preparation for a period of 2 years for every year for which assistance was received or repay all or part of such costs, in accordance with regulations issued by the Secretary.

"(i) SCHOLARSHIPS.—The Secretary may include funds for scholarships, with necessary stipends and allowances, in awards under subsections (b), (c), (d), and (e).

"(j) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section such sums as may be necessary for each of the fiscal years 1998 through 2002.

"SEC. 674. STUDIES AND EVALUATIONS.

"(a) STUDIES AND EVALUATIONS.—

"(1) IN GENERAL.—The Secretary shall, directly or through grants, contracts, or cooperative agreements, assess the progress in the implementation of this Act, including the effectiveness of State and local efforts to provide—

"(A) a free appropriate public education to children with disabilities; and

"(B) early intervention services to infants and toddlers with disabilities and infants and toddlers who would be at risk of having substantial developmental delays if early intervention services were not provided to them.

673(g)(2)-
674(a)(1)

BEST COPY AVAILABLE

"(2) AUTHORIZED ACTIVITIES.—In carrying out this subsection, the Secretary may support studies, evaluations, and assessments, including studies that—

"(A) analyze measurable impact, outcomes, and results achieved by State educational agencies and local educational agencies through their activities to reform policies, procedures, and practices designed to improve educational and transitional services and results for children with disabilities;

"(B) analyze State and local needs for professional development, parent training, and other appropriate activities that can reduce the need for disciplinary actions involving children with disabilities;

"(C) assess educational and transitional services and results for children with disabilities from minority backgrounds, including—

"(i) data on—

"(I) the number of minority children who are referred for special education evaluation;

"(II) the number of minority children who are receiving special education and related services and their educational or other service placement; and

"(III) the number of minority children who graduated from secondary and postsecondary education programs; and

"(ii) the performance of children with disabilities from minority backgrounds on State assessments and other performance indicators established for all students;

"(D) measure educational and transitional services and results of children with disabilities under this Act, including longitudinal studies that—

"(i) examine educational and transitional services and results for children with disabilities who are 3 through 17 years of age and are receiving special education and related services under this Act, using a national, representative sample of distinct age cohorts and disability categories; and

"(ii) examine educational results, postsecondary placement, and employment status of individuals with disabilities, 18 through 21 years of age, who are receiving or have received special education and related services under this Act; and

"(E) identify and report on the placement of children with disabilities by disability category.

"(b) NATIONAL ASSESSMENT.—

"(1) IN GENERAL.—The Secretary shall carry out a national assessment of activities carried out with Federal funds under this Act in order—

"(A) to determine the effectiveness of this Act in achieving its purposes;

"(B) to provide information to the President, the Congress, the States, local educational agencies, and the public on how to implement the Act more effectively; and

674(a)(2)-
(b)(1)(B)

"(C) to provide the President and the Congress with information that will be useful in developing legislation to achieve the purposes of this Act more effectively.

"(2) CONSULTATION.—The Secretary shall plan, review, and conduct the national assessment under this subsection in consultation with researchers, State practitioners, local practitioners, parents of children with disabilities, individuals with disabilities, and other appropriate individuals.

"(3) SCOPE OF ASSESSMENT.—The national assessment shall examine how well schools, local educational agencies, States, other recipients of assistance under this Act, and the Secretary are achieving the purposes of this Act, including—

"(A) improving the performance of children with disabilities in general scholastic activities and assessments as compared to nondisabled children;

"(B) providing for the participation of children with disabilities in the general curriculum;

"(C) helping children with disabilities make successful transitions from—

"(i) early intervention services to preschool education;

"(ii) preschool education to elementary school; and

"(iii) secondary school to adult life;

"(D) placing and serving children with disabilities, including minority children, in the least restrictive environment appropriate;

"(E) preventing children with disabilities, especially children with emotional disturbances and specific learning disabilities, from dropping out of school;

"(F) addressing behavioral problems of children with disabilities as compared to nondisabled children;

"(G) coordinating services provided under this Act with each other, with other educational and pupil services (including preschool services), and with health and social services funded from other sources;

"(H) providing for the participation of parents of children with disabilities in the education of their children; and

"(I) resolving disagreements between education personnel and parents through activities such as mediation.

"(4) INTERIM AND FINAL REPORTS.—The Secretary shall submit to the President and the Congress—

"(A) an interim report that summarizes the preliminary findings of the assessment not later than October 1, 1999; and

"(B) a final report of the findings of the assessment not later than October 1, 2001.

"(c) ANNUAL REPORT.—The Secretary shall report annually to the Congress on—

"(1) an analysis and summary of the data reported by the States and the Secretary of the Interior under section 618;

"(2) the results of activities conducted under subsection (a);

"(3) the findings and determinations resulting from reviews of State implementation of this Act.

674(b)(1)(C)-
(c)(3)

BEST COPY AVAILABLE

"(d) Technical Assistance to LEAs.—The Secretary shall provide directly, or through grants, contracts, or cooperative agreements, technical assistance to local educational agencies to assist them in carrying out local capacity-building and improvement projects under section 611(f)(4) and other LEA systemic improvement activities under this Act.

"(e) Reservation for Studies and Technical Assistance.—

"(1) In general.—Except as provided in paragraph (2) and notwithstanding any other provision of this Act, the Secretary may reserve up to one-half of one percent of the amount appropriated under parts B and C for each fiscal year to carry out this section.

"(2) Maximum amount.—For the first fiscal year in which the amount described in paragraph (1) is at least $20,000,000, the maximum amount the Secretary may reserve under paragraph (1) is $20,000,000. For each subsequent fiscal year, the maximum amount the Secretary may reserve under paragraph (1) is $20,000,000, increased by the cumulative rate of inflation since the fiscal year described in the previous sentence.

"(3) Use of maximum amount.—In any fiscal year described in paragraph (2) for which the Secretary reserves the maximum amount described in that paragraph, the Secretary shall use at least half of the reserved amount for activities under subsection (d).

"Chapter 2—Improving Early Intervention, Educational, and Transitional Services and Results for Children With Disabilities Through Coordinated Technical Assistance, Support, and Dissemination of Information

"SEC. 681. FINDINGS AND PURPOSES.

"(a) In General.—The Congress finds as follows:

"(1) National technical assistance, support, and dissemination activities are necessary to ensure that parts B and C are fully implemented and achieve quality early intervention, educational, and transitional results for children with disabilities and their families.

"(2) Parents, teachers, administrators, and related services personnel need technical assistance and information in a timely, coordinated, and accessible manner in order to improve early intervention, educational, and transitional services and results at the State and local levels for children with disabilities and their families.

"(3) Parent training and information activities have taken on increased importance in efforts to assist parents of a child with a disability in dealing with the multiple pressures of rearing such a child and are of particular importance in—

"(A) ensuring the involvement of such parents in planning and decisionmaking with respect to early intervention, educational, and transitional services;

"(B) achieving quality early intervention, educational, and transitional results for children with disabilities;

"(C) providing such parents information on their rights and protections under this Act to ensure improved early

674(d)-
681(a)(3)(C)

intervention, educational, and transitional results for children with disabilities;

"(D) assisting such parents in the development of skills to participate effectively in the education and development of their children and in the transitions described in section 674(b)(3)(C); and

"(E) supporting the roles of such parents as participants within partnerships seeking to improve early intervention, educational, and transitional services and results for children with disabilities and their families.

"(4) Providers of parent training and information activities need to ensure that such parents who have limited access to services and supports, due to economic, cultural, or linguistic barriers, are provided with access to appropriate parent training and information activities.

"(5) Parents of children with disabilities need information that helps the parents to understand the rights and responsibilities of their children under part B.

"(6) The provision of coordinated technical assistance and dissemination of information to State and local agencies, institutions of higher education, and other providers of services to children with disabilities is essential in—

"(A) supporting the process of achieving systemic change;

"(B) supporting actions in areas of priority specific to the improvement of early intervention, educational, and transitional results for children with disabilities;

"(C) conveying information and assistance that are—

"(i) based on current research (as of the date the information and assistance are conveyed);

"(ii) accessible and meaningful for use in supporting systemic-change activities of State and local partnerships; and

"(iii) linked directly to improving early intervention, educational, and transitional services and results for children with disabilities and their families; and

"(D) organizing systems and information networks for such information, based on modern technology related to—

"(i) storing and gaining access to information; and

"(ii) distributing information in a systematic manner to parents, students, professionals, and policymakers.

"(7) Federal support for carrying out technology research, technology development, and educational media services and activities has resulted in major innovations that have significantly improved early intervention, educational, and transitional services and results for children with disabilities and their families.

"(8) Such Federal support is needed—

"(A) to stimulate the development of software, interactive learning tools, and devices to address early intervention, educational, and transitional needs of children with disabilities who have certain disabilities;

"(B) to make information available on technology research, technology development, and educational media

681(a)(3)(D)-
(8)(B)

BEST COPY AVAILABLE

services and activities to individuals involved in the provision of early intervention, educational, and transitional services to children with disabilities;

"(C) to promote the integration of technology into curricula to improve early intervention, educational, and transitional results for children with disabilities;

"(D) to provide incentives for the development of technology and media devices and tools that are not readily found or available because of the small size of potential markets;

"(E) to make resources available to pay for such devices and tools and educational media services and activities;

"(F) to promote the training of personnel—

"(i) to provide such devices, tools, services, and activities in a competent manner; and

"(ii) to assist children with disabilities and their families in using such devices, tools, services, and activities; and

"(G) to coordinate the provision of such devices, tools, services, and activities—

"(i) among State human services programs; and

"(ii) between such programs and private agencies.

"(b) PURPOSES.—The purposes of this chapter are to ensure that—

"(1) children with disabilities, and their parents, receive training and information on their rights and protections under this Act, in order to develop the skills necessary to effectively participate in planning and decisionmaking relating to early intervention, educational, and transitional services and in systemic-change activities;

"(2) parents, teachers, administrators, early intervention personnel, related services personnel, and transition personnel receive coordinated and accessible technical assistance and information to assist such persons, through systemic-change activities and other efforts, to improve early intervention, educational, and transitional services and results for children with disabilities and their families;

"(3) appropriate technology and media are researched, developed, demonstrated, and made available in timely and accessible formats to parents, teachers, and all types of personnel providing services to children with disabilities to support their roles as partners in the improvement and implementation of early intervention, educational, and transitional services and results for children with disabilities and their families;

"(4) on reaching the age of majority under State law, children with disabilities understand their rights and responsibilities under part B, if the State provides for the transfer of parental rights under section 615(m); and

"(5) the general welfare of deaf and hard-of-hearing individuals is promoted by—

"(A) bringing to such individuals understanding and appreciation of the films and television programs that play an important part in the general and cultural advancement of hearing individuals;

"(B) providing, through those films and television programs, enriched educational and cultural experiences

681(a)(3)(C)

(b)(5)(B)

through which deaf and hard-of-hearing individuals can better understand the realities of their environment; and

"(C) providing wholesome and rewarding experiences that deaf and hard-of-hearing individuals may share.

"SEC. 682. PARENT TRAINING AND INFORMATION CENTERS.

"(a) PROGRAM AUTHORIZED.—The Secretary may make grants to, and enter into contracts and cooperative agreements with, parent organizations to support parent training and information centers to carry out activities under this section.

"(b) REQUIRED ACTIVITIES.—Each parent training and information center that receives assistance under this section shall—

"(1) provide training and information that meets the training and information needs of parents of children with disabilities living in the area served by the center, particularly underserved parents and parents of children who may be inappropriately identified;

"(2) assist parents to understand the availability of, and how to effectively use, procedural safeguards under this Act, including encouraging the use, and explaining the benefits, of alternative methods of dispute resolution, such as the mediation process described in section 615(e);

"(3) serve the parents of infants, toddlers, and children with the full range of disabilities;

"(4) assist parents to—

"(A) better understand the nature of their children's disabilities and their educational and developmental needs;

"(B) communicate effectively with personnel responsible for providing special education, early intervention, and related services;

"(C) participate in decisionmaking processes and the development of individualized education programs under part B and individualized family service plans under part C;

"(D) obtain appropriate information about the range of options, programs, services, and resources available to assist children with disabilities and their families;

"(E) understand the provisions of this Act for the education of, and the provision of early intervention services to, children with disabilities; and

"(F) participate in school reform activities;

"(5) in States where the State elects to contract with the parent training and information center, contract with State educational agencies to provide, consistent with subparagraphs (B) and (D) of section 615(e)(2), individuals who meet with parents to explain the mediation process to them;

"(6) network with appropriate clearinghouses, including organizations conducting national dissemination activities under section 685(d), and with other national, State, and local organizations and agencies, such as protection and advocacy agencies, that serve parents and families of children with the full range of disabilities; and

"(7) annually report to the Secretary on—

"(A) the number of parents to whom it provided information and training in the most recently concluded fiscal year; and

681(b)(5)(C
682(b)(7)(A

BEST COPY AVAILABLE

"(B) the effectiveness of strategies used to reach and serve parents, including underserved parents of children with disabilities.

"(c) OPTIONAL ACTIVITIES.—A parent training and information center that receives assistance under this section may—

"(1) provide information to teachers and other professionals who provide special education and related services to children with disabilities;

"(2) assist students with disabilities to understand their rights and responsibilities under section 615(m) on reaching the age of majority; and

"(3) assist parents of children with disabilities to be informed participants in the development and implementation of the State's State improvement plan under subpart 1.

"(d) APPLICATION REQUIREMENTS.—Each application for assistance under this section shall identify with specificity the special efforts that the applicant will undertake—

"(1) to ensure that the needs for training and information of underserved parents of children with disabilities in the area to be served are effectively met; and

"(2) to work with community-based organizations.

"(e) DISTRIBUTION OF FUNDS.—

"(1) IN GENERAL.—The Secretary shall make at least 1 award to a parent organization in each State, unless the Secretary does not receive an application from such an organization in each State of sufficient quality to warrant approval.

"(2) SELECTION REQUIREMENT.—The Secretary shall select among applications submitted by parent organizations in a State in a manner that ensures the most effective assistance to parents, including parents in urban and rural areas, in the State.

"(f) QUARTERLY REVIEW.—

"(1) REQUIREMENTS.—

"(A) MEETINGS.—The board of directors or special governing committee of each organization that receives an award under this section shall meet at least once in each calendar quarter to review the activities for which the award was made.

"(B) ADVISING BOARD.—Each special governing committee shall directly advise the organization's governing board of its views and recommendations.

"(2) CONTINUATION AWARD.—When an organization requests a continuation award under this section, the board of directors or special governing committee shall submit to the Secretary a written review of the parent training and information program conducted by the organization during the preceding fiscal year.

"(g) DEFINITION OF PARENT ORGANIZATION.—As used in this section, the term 'parent organization' means a private nonprofit organization (other than an institution of higher education) that—

"(1) has a board of directors—

"(A) the majority of whom are parents of children with disabilities;

"(B) that includes—

"(i) individuals working in the fields of special education, related services, and early intervention; and

"(ii) individuals with disabilities; and

682(b)(1

(g)(1)(B)

"(C) the parent and professional members of which are broadly representative of the population to be served; or

"(2) has—

"(A) a membership that represents the interests of individuals with disabilities and has established a special governing committee that meets the requirements of paragraph (1); and

"(B) a memorandum of understanding between the special governing committee and the board of directors of the organization that clearly outlines the relationship between the board and the committee and the decisionmaking responsibilities and authority of each.

"SEC. 683. COMMUNITY PARENT RESOURCE CENTERS.

"(a) IN GENERAL.—The Secretary may make grants to, and enter into contracts and cooperative agreements with, local parent organizations to support parent training and information centers that will help ensure that underserved parents of children with disabilities, including low-income parents, parents of children with limited English proficiency, and parents with disabilities, have the training and information they need to enable them to participate effectively in helping their children with disabilities—

"(1) to meet developmental goals and, to the maximum extent possible, those challenging standards that have been established for all children; and

"(2) to be prepared to lead productive independent adult lives, to the maximum extent possible.

"(b) REQUIRED ACTIVITIES.—Each parent training and information center assisted under this section shall—

"(1) provide training and information that meets the training and information needs of parents of children with disabilities proposed to be served by the grant, contract, or cooperative agreement;

"(2) carry out the activities required of parent training and information centers under paragraphs (2) through (7) of section 682(b);

"(3) establish cooperative partnerships with the parent training and information centers funded under section 682; and

"(4) be designed to meet the specific needs of families who experience significant isolation from available sources of information and support.

"(c) DEFINITION.—As used is this section, the term 'local parent organization' means a parent organization, as defined in section 682(g), that either—

"(1) has a board of directors the majority of whom are from the community to be served; or

"(2) has—

"(A) as a part of its mission, serving the interests of individuals with disabilities from such community; and

"(B) a special governing committee to administer the grant, contract, or cooperative agreement, a majority of the members of which are individuals from such community.

682(g)(1)(C)-
683-(c)

BEST COPY AVAILABLE

"SEC. 684. TECHNICAL ASSISTANCE FOR PARENT TRAINING AND INFORMATION CENTERS.

"(a) IN GENERAL.—The Secretary may, directly or through awards to eligible entities, provide technical assistance for developing, assisting, and coordinating parent training and information programs carried out by parent training and information centers receiving assistance under sections 682 and 683.

"(b) AUTHORIZED ACTIVITIES.—The Secretary may provide technical assistance to a parent training and information center under this section in areas such as—

"(1) effective coordination of parent training efforts;

"(2) dissemination of information;

"(3) evaluation by the center of itself;

"(4) promotion of the use of technology, including assistive technology devices and assistive technology services;

"(5) reaching underserved populations;

"(6) including children with disabilities in general education programs;

"(7) facilitation of transitions from—

"(A) early intervention services to preschool;

"(B) preschool to school; and

"(C) secondary school to postsecondary environments; and

"(8) promotion of alternative methods of dispute resolution.

"SEC. 685. COORDINATED TECHNICAL ASSISTANCE AND DISSEMINATION.

"(a) IN GENERAL.—The Secretary shall, by competitively making grants or entering into contracts and cooperative agreements with eligible entities, provide technical assistance and information, through such mechanisms as institutes, Regional Resource Centers, clearinghouses, and programs that support States and local entities in building capacity, to improve early intervention, educational, and transitional services and results for children with disabilities and their families, and address systemic-change goals and priorities.

"(b) SYSTEMIC TECHNICAL ASSISTANCE; AUTHORIZED ACTIVITIES.—

"(1) IN GENERAL.—In carrying out this section, the Secretary shall carry out or support technical assistance activities, consistent with the objectives described in subsection (a), relating to systemic change.

"(2) AUTHORIZED ACTIVITIES.—Activities that may be carried out under this subsection include activities such as the following:

"(A) Assisting States, local educational agencies, and other participants in partnerships established under subpart 1 with the process of planning systemic changes that will promote improved early intervention, educational, and transitional results for children with disabilities.

"(B) Promoting change through a multistate or regional framework that benefits States, local educational agencies, and other participants in partnerships that are in the process of achieving systemic-change outcomes.

"(C) Increasing the depth and utility of information in ongoing and emerging areas of priority need identified by States, local educational agencies, and other participants

684 -
685(b)(2)(C)

in partnerships that are in the process of achieving systemic-change outcomes.

"(D) Promoting communication and information exchange among States, local educational agencies, and other participants in partnerships, based on the needs and concerns identified by the participants in the partnerships, rather than on externally imposed criteria or topics, regarding—

"(i) the practices, procedures, and policies of the States, local educational agencies, and other participants in partnerships; and

"(ii) accountability of the States, local educational agencies, and other participants in partnerships for improved early intervention, educational, and transitional results for children with disabilities.

"(c) SPECIALIZED TECHNICAL ASSISTANCE; AUTHORIZED ACTIVITIES.—

"(1) IN GENERAL.—In carrying out this section, the Secretary shall carry out or support activities, consistent with the objectives described in subsection (a), relating to areas of priority or specific populations.

"(2) AUTHORIZED ACTIVITIES.—Examples of activities that may be carried out under this subsection include activities that—

"(A) focus on specific areas of high-priority need that—

"(i) are identified by States, local educational agencies, and other participants in partnerships;

"(ii) require the development of new knowledge, or the analysis and synthesis of substantial bodies of information not readily available to the States, agencies, and other participants in partnerships; and

"(iii) will contribute significantly to the improvement of early intervention, educational, and transitional services and results for children with disabilities and their families;

"(B) focus on needs and issues that are specific to a population of children with disabilities, such as the provision of single-State and multi-State technical assistance and in-service training—

"(i) to schools and agencies serving deaf-blind children and their families; and

"(ii) to programs and agencies serving other groups of children with low-incidence disabilities and their families; or

"(C) address the postsecondary education needs of individuals who are deaf or hard-of-hearing.

"(d) NATIONAL INFORMATION DISSEMINATION; AUTHORIZED ACTIVITIES.—

"(1) IN GENERAL.—In carrying out this section, the Secretary shall carry out or support information dissemination activities that are consistent with the objectives described in subsection (a), including activities that address national needs for the preparation and dissemination of information relating to eliminating barriers to systemic-change and improving early intervention, educational, and transitional results for children with disabilities.

BEST COPY AVAILABLE 685(b)(2)(D)

(d)(1)

"(2) AUTHORIZED ACTIVITIES.—Examples of activities that may be carried out under this subsection include activities relating to—

"(A) infants and toddlers with disabilities and their families, and children with disabilities and their families;

"(B) services for populations of children with low-incidence disabilities, including deaf-blind children, and targeted age groupings;

"(C) the provision of postsecondary services to individuals with disabilities;

"(D) the need for and use of personnel to provide services to children with disabilities, and personnel recruitment, retention, and preparation;

"(E) issues that are of critical interest to State educational agencies and local educational agencies, other agency personnel, parents of children with disabilities, and individuals with disabilities;

"(F) educational reform and systemic change within States; and

"(G) promoting schools that are safe and conducive to learning.

"(3) LINKING STATES TO INFORMATION SOURCES.—In carrying out this subsection, the Secretary may support projects that link States to technical assistance resources, including special education and general education resources, and may make research and related products available through libraries, electronic networks, parent training projects, and other information sources.

"(e) APPLICATIONS.—An eligible entity that wishes to receive a grant, or enter into a contract or cooperative agreement, under this section shall submit an application to the Secretary at such time, in such manner, and containing such information as the Secretary may require.

"SEC. 686. AUTHORIZATION OF APPROPRIATIONS.

"There are authorized to be appropriated to carry out sections 681 through 685 such sums as may be necessary for each of the fiscal years 1998 through 2002.

"SEC. 687. TECHNOLOGY DEVELOPMENT, DEMONSTRATION, AND UTILIZATION; AND MEDIA SERVICES.

"(a) IN GENERAL.—The Secretary shall competitively make grants to, and enter into contracts and cooperative agreements with, eligible entities to support activities described in subsections (b) and (c).

"(b) TECHNOLOGY DEVELOPMENT, DEMONSTRATION, AND UTILIZATION; AUTHORIZED ACTIVITIES.—

"(1) IN GENERAL.—In carrying out this section, the Secretary shall support activities to promote the development, demonstration, and utilization of technology.

"(2) AUTHORIZED ACTIVITIES.—Activities that may be carried out under this subsection include activities such as the following:

"(A) Conducting research and development activities on the use of innovative and emerging technologies for children with disabilities.

"(B) Promoting the demonstration and use of innovative and emerging technologies for children with disabilities

685(d)(2)
687(b)(2)(B)

by improving and expanding the transfer of technology from research and development to practice.

"(C) Providing technical assistance to recipients of other assistance under this section, concerning the development of accessible, effective, and usable products.

"(D) Communicating information on available technology and the uses of such technology to assist children with disabilities.

"(E) Supporting the implementation of research programs on captioning or video description.

"(F) Supporting research, development, and dissemination of technology with universal-design features, so that the technology is accessible to individuals with disabilities without further modification or adaptation.

"(G) Demonstrating the use of publicly-funded telecommunications systems to provide parents and teachers with information and training concerning early diagnosis of, intervention for, and effective teaching strategies for, young children with reading disabilities.

"(c) EDUCATIONAL MEDIA SERVICES; AUTHORIZED ACTIVITIES.—In carrying out this section, the Secretary shall support—

"(1) educational media activities that are designed to be of educational value to children with disabilities;

"(2) providing video description, open captioning, or closed captioning of television programs, videos, or educational materials through September 30, 2001; and after fiscal year 2001, providing video description, open captioning, or closed captioning of educational, news, and informational television, videos, or materials;

"(3) distributing captioned and described videos or educational materials through such mechanisms as a loan service;

"(4) providing free educational materials, including textbooks, in accessible media for visually impaired and print-disabled students in elementary, secondary, postsecondary, and graduate schools;

"(5) providing cultural experiences through appropriate nonprofit organizations, such as the National Theater of the Deaf, that—

"(A) enrich the lives of deaf and hard-of-hearing children and adults;

"(B) increase public awareness and understanding of deafness and of the artistic and intellectual achievements of deaf and hard-of-hearing persons; or

"(C) promote the integration of hearing, deaf, and hard-of-hearing persons through shared cultural, educational, and social experiences; and

"(6) compiling and analyzing appropriate data relating to the activities described in paragraphs (1) through (5).

"(d) APPLICATIONS.—Any eligible entity that wishes to receive a grant, or enter into a contract or cooperative agreement, under this section shall submit an application to the Secretary at such time, in such manner, and containing such information as the Secretary may require.

"(e) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section such sums as may be necessary for each of the fiscal years 1998 through 2002.".

687(b)(2)(C)

(c)

TITLE II—MISCELLANEOUS PROVISIONS

SEC. 201. EFFECTIVE DATES.

(a) PARTS A AND B.—

(1) IN GENERAL.—Except as provided in paragraph (2), parts A and B of the Individuals with Disabilities Education Act, as amended by title I, shall take effect upon the enactment of this Act.

(2) EXCEPTIONS.—

(A) IN GENERAL.—Sections 612(a)(4), 612(a)(14), 612(a)(16), 614(d) (except for paragraph (6)), and 618 of the Individuals with Disabilities Education Act, as amended by title I, shall take effect on July 1, 1998.

(B) SECTION 617.—Section 617 of the Individuals with Disabilities Education Act, as amended by title I, shall take effect on October 1, 1997.

(C) INDIVIDUALIZED EDUCATION PROGRAMS AND COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT.—Section 618 of the Individuals with Disabilities Education Act, as in effect on the day before the date of the enactment of this Act, and the provisions of parts A and B of the Individuals with Disabilities Education Act relating to individualized education programs and the State's comprehensive system of personnel development, as so in effect, shall remain in effect until July 1, 1998.

(D) SECTIONS 611 AND 619.—Sections 611 and 619, as amended by title I, shall take effect beginning with funds appropriated for fiscal year 1998.

(b) PART C.—Part C of the Individuals with Disabilities Education Act, as amended by title I, shall take effect on July 1, 1998.

(c) PART D.—

(1) IN GENERAL.—Except as provided in paragraph (2), part D of the Individuals with Disabilities Education Act, as amended by title I, shall take effect on October 1, 1997.

(2) EXCEPTION.—Paragraphs (1) and (2) of section 661(g) of the Individuals with Disabilities Education Act, as amended by title I, shall take effect on January 1, 1998.

SEC. 202. TRANSITION.

Notwithstanding any other provision of law, beginning on October 1, 1997, the Secretary of Education may use funds appropriated under part D of the Individuals with Disabilities Education Act to make continuation awards for projects that were funded under section 618 and parts C through G of such Act (as in effect on September 30, 1997).

[201-
202]

SEC. 203. REPEALERS.

(a) PART I.—Effective October 1, 1998, part I of the Individuals with Disabilities Education Act is hereby repealed.

(b) PART H.—Effective July 1, 1998, part H of such Act is hereby repealed.

(c) PARTS C, E, F, AND G.—Effective October 1, 1997, parts C, E, F, and G of such Act are hereby repealed.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

[203]

INDIVIDUALS WITH DISABILITIES EDUCATION ACT AMENDMENTS 1997

Summary of Major Changes and New Responsibilities

Arizona Department of Education
Exceptional Student Services
1535 West Jefferson
Phoenix, Arizona 85007
(602) 542-3184

Rev. 08/27/97

Table of Contents

Page Number

IDEA Amendments 1997 Timelines iii

Introduction iv

Child Find

Child Find 1

Evaluation

Notice/Consent for Initial Evaluations and Reevaluations 2
Initial Evaluation 2
Reevaluation 3
Eligibility 4

Individualized Education Program (IEP)

Composition of the IEP 5
Notice of the IEP Meeting 5
Development of the IEP 6
Contents of the IEP 6
Transition from School to Work 8
Transition from Early Intervention Services to Preschool Programs 8
Review and Revision of the IEP 8

Placement in Special Education Services

Least Restrictive Environment 10
Unilateral Placements 10
Private School Students 11
Participation in State Assessment 11
Reports on Performance 12
Alternative Assessments 12

Procedural Safeguards

Procedural Safeguards 13
Transfer of Rights at Age of Majority 17

Discipline Provisions

Continuation of Services 18
Placement in an Interim Alternative Educational Setting (IAES) 18
Determination of Alternative Setting 19
Manifestation Determination Review 19

Page Number

Discipline Procedures

Regular Education Students Who Are Entitled to Assert IDEA Procedural Protections 22
Suspension and Expulsion Rates 23
Alternative Educational Settings (Flow Chart) 24
Discipline Questions: Student Violates Code of Conduct (Flow Chart) 25

Other Provisions

Definitions 26
OSEP Policy Letters 26
Charter Schools 26
Referral to Law Enforcement/Judicial Authorities 27
Transfer of Special Education and Disciplinary Records 27
Corrections 27
Children with Disabilities in Adult Prisons 27
Funding 28
Data Requirements 29
Additional Data Requirements 29
Interagency Agreements (IGAs) 30
Comprehensive System of Staff Development (CSPD) 30
Penalties for Failure to Comply with the IDEA Amendments of 1997 31

IDEA Amendments 1997 Timelines

April 29, 1997	H.R.5 Staff Draft is released to the public.
May 7, 1997	U.S. House and Senate Committees "mark up" the bill.
May 13, 1997	U.S. House passes the bill 420 to 3.
May 14, 1997	U.S. Senate passes the bill 98 to 1.
June 4, 1997	President signs the bill, and it becomes a law. Most components go into effect immediately.
June, 1997 - September, 1997	ADE/ESS provides reference documents, training, and regional updates to administrators, school personnel, and parents throughout the state.
September, 1997	U.S. Department of Education is scheduled to publish a notice of rulemaking.
September, 1997 - January, 1998	USDOE/OSEP will conduct an on-site visit to the State expressly to facilitate the formulation of a state-specific 1997 IDEA Amendments implementation plan with ADE/ESS staff and parent, advocacy group, and LEA representatives.
October 14&15, 1997	ADE/ESS Annual Director's Institute focusing on the implementation of IDEA Amendments of 1997 for LEA teams of special education directors, teachers, secretaries, and parents.
October, 1997 - May, 1998	ADE/ESS implements special monitoring cycle in lieu of current cycle for one year only. All districts and charter schools will be asked to conduct a self-evaluation to review all IDEA and reauthorization requirements, and ADE/ESS will provide enhances technical assistance. If substantive allegations of systems failure occur, the ADE/ESS will notify district/charter school and conduct a compliance monitoring.
April, 1998	U.S. Department of Education to publish final regulations.
July 1, 1998	Full law is in effect, including new IEP requirements, performance goals and indicators, reporting on statewide assessment, and new CSPD requirements.
July 1, 2000	Alternative assessments are in place.

BEST COPY AVAILABLE

INDIVIDUALS WITH DISABILITIES EDUCATION ACT AMENDMENTS 1997

Summary of Major Changes and New Responsibilities

Introduction

President Bill Clinton signed the 1997 Amendments to the Individuals with Disabilities Education Act (IDEA) into law on June 4, 1997. Most of the new statutory provisions went into effect immediately upon the presidential signing of the bill, which requires that these are to be implemented immediately during this 1997-98 school year. The overarching themes of the 1997 Reauthorization are to challenge students with disabilities to participate in the general education curriculum and statewide assessment and to provide greater involvement of parents in all aspects of the special education process.

This document, the *Summary of Major Changes and Responsibilities*, presents an overview of the 1997 Reauthorization, highlights many of the new statutory changes, and represents a preliminary understanding of requirements. Other general requirements from the 1990 Reauthorization will remain in effect, unless noted within the context of this document. Until the federal regulations are promulgated, many questions of statutory interpretation surround this law due to the newness and the complexity of the changes in these provisions. The U.S. Department of Education, Office of Special Education Programs (USDOE/OSEP), is scheduled to begin drafting regulations for public comment during the fall in order to clarify directives and implementation requirements.

The major changes outlined in this summary are presented following the special education process that is the heart of IDEA '97. This is the process that must be followed by the State Educational Agency (SEA), by all Local Educational Agencies (LEA), and by other State Agencies that provide special education services in Arizona. Reference to federal citations and timelines are noted within each section. This document should be used in conjunction with the Amendments, and is not meant to substitute for a careful reading of the legislative language. The complete Act has been provided to all LEAs, State Agencies, advocates, and others in the community who are interested in special education. It is also available on the Arizona Department of Education, Exceptional Student Services (ADE/ESS) Home Page at *www.ade.state.az.us*.

Definitions

The 1997 Amendments to the Individuals with Disabilities Education Act is referred to in this summary as "IDEA '97." As noted above, LEA is used when referring to local education agencies which includes school districts, charter schools, and other state agencies charged with providing educational services to students with disabilities. SEA is used when referring to the Arizona Department of Education.

Child Find

Child Find [§612(a)(3)(A); §612(l)(10)(A)(ii)]
Effective June 4, 1997

1. Under current law, there is a requirement to identify, locate, and evaluate all children with disabilities who are in need of special education and related services and who are living within the district.

2. IDEA '97 adds the requirement that Child Find must include all children with disabilities attending private schools, which includes non-public private schools and elementary and secondary parochial schools.

Evaluation

Notice/Consent for Initial Evaluations and Reevaluations [§614(a)-(c)]
Effective June 4, 1997

1. Provide notice to parents describing any evaluation procedures to be conducted. Informed parent consent is required for both initial evaluation and reevaluation.

2. Obtain informed consent from parents before conducting the evaluation. Consent shall not be construed as consent for placement.

    A. If parents refuse consent for the initial evaluation, the school may use mediation and due process procedures to pursue the evaluation.

    B. If parents fail to respond to a request for consent for a reevaluation, the evaluation may take place if the district can demonstrate it has taken reasonable measures to involve the parent.

3. Ensure, to the extent possible, that the parents participate fully in the evaluation process, including, but not limited to, providing input and attending all planning meetings.

Initial Evaluation [§614(b)(2)(A-(C); §614(b)(3)(A)-(D)]
Effective June 4, 1997

1. Use a variety of assessment tools and strategies to gather relevant functional and developmental information, including information provided by the parents, that may assist in determining whether the child is an eligible child with a disability; and

    A. Include information related to enabling the child to be involved in and progress in general curriculum.

    B. For the preschool child, include information to allow the child to participate in appropriate activities.

2. Use technically sound instruments, validated for the specific purpose for which they are used and administered by trained and knowledgeable personnel that may assess the relevant contribution of cognitive and behavioral factors in addition to physical or developmental factors.

3. Select and administer all evaluation materials so as not to be culturally or racially discriminatory.

4. Administer tests in the child's native language or other mode of communication, unless it is not feasible to do so.

5. Assess the child in all areas of suspected disability and include a review of existing data, current classroom-based assessment, observations, and evaluations and information provided by the parents of the child.

6. Use assessments to provide information to determine the child's educational needs related to enabling access to and progress in the general curriculum.

7. Use assessments to determine whether the child has a particular category of disability under federal law, the present levels of performance and educational needs of the child, and whether the child needs special education and related services or modifications.

8. Ensure that no single test procedure is used as the sole criterion for determining whether a child is a child with a disability or for determining an appropriate education program for that child.

Reevaluation [§614(a)(2); 614(c)(1)-(5)]
Effective June 4, 1997

1. The IEP team, parent, and other qualified professionals, as appropriate, are charged with reviewing existing data to determine what additional tools or strategies may be needed to answer specific evaluation questions.

    A. If the IEP team, parent, and other qualified personnel, as appropriate, determine that no additional data is needed for continued eligibility, the LEA shall:

        i. Notify parents of the determination and reasons for the decision; and

        ii. Inform parents of their procedural rights, including the right to request an assessment.

        iii. Under these circumstances, reevaluation shall **not** be required unless requested by the parent.

    B. If the determination is made that additional data is needed for continued eligibility or program planning, the LEA shall:

        i. Obtain informed parental consent.

        ii. Carry out all assessments to obtain the identified additional data.

2. The triennial reevaluation requirement is still in effect if conditions warrant or if the parent or child's teacher requests reevaluation.

3. An evaluation is always required before determining that a child is no longer a child with a disability.

Eligibility [§614(b)(4)(5); 612(a)(3)(B)]
Effective June 4, 1997

1. A team of qualified professionals and the child's parent will determine if the child meets eligibility requirements.

2. A copy of the eligibility determination and evaluation report must be provided to the parent.

3. In making a determination of eligibility, a child shall not be determined to be a child with a disability based on lack of instruction in reading or math or because the child is limited in English proficiency.

4. There is no legal requirement that a child be classified by disability in order to be determined to be a child with a disability, as long as that child meets the federal eligibility definition and needs special education and related services.

Individualized Education Program (IEP)

Many of the elements outlined in the IEP section of the 1997 Amendments are currently in place in Arizona.

Composition of the IEP Team [§614(d)(1)(B)]
Effective July 1, 1998

The IEP team shall include the following members:

1. The parent(s).

2. At least one regular education teacher (if the child is, or may be, participating in regular education).

3. At least one special education teacher or, where appropriate, at least one special education provider of such child.

4. A representative of the LEA who is:

   A. Qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of children with disabilities.

   B. Knowledgeable about the general curriculum.

   C. Knowledgeable about the availability of resources of the LEA.

5. An individual who can interpret the instructional implications of the evaluation results.

6. At the discretion of the parent or the LEA, other individuals who have knowledge or special expertise regarding the child, including related services personnel, as appropriate.

7. Whenever appropriate, the child with a disability.

Notice of the IEP Meeting [§615(c)&(d)]
Effective July 1, 1998

1. Previously, the contents that were to be included in the meeting notice were provided in 34 C.F.R. Part 300, along with the contents of the procedural safeguard notice.

2. IDEA '97 places both notice requirements in the statute.

   A. The Procedural Safeguards Notice, including a copy of all procedural safeguards, must be available to the parents upon each notification of an IEP meeting, as well as at other required times.

   B. Prior Written Notice must be provided to parents after the IEP meeting, but before action is taken.

Development of the IEP [§614(d)(3)]
Effective July 1, 1998

The IEP team with the parent shall consider:

1. The strengths of the child and the concerns of the parents for enhancing the education of their child.

2. The results of the initial evaluation or most recent evaluation of the child.

3. For children who meet the specific criteria, additional areas must be addressed.

    A. For the child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.

    B. For the child with limited English proficiency, consider the language needs of the child.

    C. For the child who is blind or visually impaired, review the need for Braille and make it available for instruction, if appropriate. If Braille is not appropriate for a particular child, provide the reasons why it is not necessary.

    D. For the child who is deaf or hard of hearing, consider the full range of language and communication needs of the child, including opportunities for direct instruction in the child's language and communication mode.

    E. For all children, consider whether the child requires assistive technology devices and services.

Contents of the IEP [§614(d)]
Effective July 1, 1998

1. A statement of the child's present levels of educational performance, including:

    A. How the child's disability affects the child's involvement and progress in the general curriculum; or

    B. For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities.

2. A statement of measurable annual goals, including benchmarks or short-term objectives, related to:

    A. Meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and

B. Meeting each of the child's other educational needs that result from the child's disability.

3. A statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and any program modifications or support for all school personnel necessary for the child:

A. To advance appropriately toward attaining the annual goals;

B. To be involved and progress in the general curriculum and to participate in extracurricular and other nonacademic activities; and

C. To be educated and participate with other children with disabilities and nondisabled children in the activities described in this paragraph.

3. An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in special education classes.

4. A statement of any individual modifications in the administration of state- or district-wide assessments of student achievement that are needed in order for the child to participate in such assessment.

5. If the IEP team determines that the child will not participate in a particular state- or district-wide assessment of student achievement (or part of such an assessment), a statement of:

A. Why the assessment is not appropriate for the child; and

B. How the child will be assessed.

7. The projected date for the beginning of the services and modifications needed for the child, and the anticipated frequency, location, and duration of those services and modifications.

8. A statement of:

A. How the child's progress toward the annual goals will be measured; and

B. How the child's parents will be informed of their child's progress on a regular basis, at least as often as parents are informed of their nondisabled children's progress of:

i. Progress toward the annual goals; and

ii. The extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

Transition from School to Work [§614(d)(1)(A)(vii)]

Effective July 1, 1998

Transition requirements:

1. Beginning at age 14, and updated annually, a statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's courses of study (such as participation in advanced-placement courses or a vocational educational program).

2. Beginning at age 16 (or younger, if determined appropriate by the IEP team), a statement of needed transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages.

3. Beginning at least one year before the child reaches the age of majority under state law, a statement that the child has been informed of his or her rights under this title, if any, that will transfer to the child on reaching the age of majority.

4. If a participating agency, other than the LEA, fails to provide the transition services described in the IEP, the LEA shall reconvene the IEP team to identify alternative strategies to meet the transition objectives for the child set out in that program.

Transition from Early Intervention Services to Preschool Programs [§612(a)(9)]

Effective July 1, 1998

1. By the third birthday of a child transitioning from early intervention services to a preschool program, an IEP or an individualized family service plan (IFSP) has been developed and is being implemented for the child.

2. The LEA will participate in transition planning conferences arranged by the designated lead agency.

Review and Revision of the IEP [§614(d)(4)(A)(B)]

Effective July 1, 1998

1. The IEP team shall:

   A. Review the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

   B. Revise the IEP as appropriate to address:

      i. Any lack of expected progress toward the annual goals and in the general curriculum, where appropriate;

      ii. The results of any reevaluation;

      iii. Information about the child provided to or by the parents;

  iv. The child's anticipated needs; and

  v. Other matters.

2. The regular education teacher of the child, as a member of the IEP team, shall, to the extent appropriate, participate in the review and revision of the IEP of the child.

Placement in Special Education Services

Least Restrictive Environment (LRE) [§612(a)(5); 614(f)]
Effective June 4, 1997

1. The parents of the child with a disability are members of any group making placement decisions.

2. LRE considerations continue to stress that, to the maximum extent appropriate, children with disabilities, including those in public and private institutions, are educated with nondisabled children, and that all children with disabilities have access to the general education curriculum and state assessment processes.

3. State funding formulas based on the type of setting in which the child is served must be reviewed to ensure that they do not support the violation of LRE requirements. If so, a state must revise the funding mechanism as soon as feasible.

Unilateral Placements [§612(a)(10)(C)]
Effective June 4, 1997

1. In general, the LEA is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency previously had made a free appropriate public education (FAPE) available to the child and the parents elected to place the child in the private school or facility.

2. For students who previously received special education services from an LEA, whose parents enroll them in a private school or facility without consent or referral from the LEA:

    A. A hearing officer or court may order reimbursement if a FAPE was not made available in a timely manner before the student was removed from public school.

    B. Reimbursement may be reduced or denied if:

        i. At the most recent IEP meeting the parent attended, the parent did not inform the IEP team of concerns and intent to enroll the child in private school at public expense;

        ii. The parent failed to provide written notice to the district of their intent at least 10 business days prior to removing the child;

        iii. The parent failed to make the child available for an evaluation for which the parent was notified; or

        iv. There is a judicial finding of unreasonableness with respect to parental action.

    C. Even with the notice requirement noted above, the reimbursement may not be reduced or denied for failure to provide such notice if:

i. The parent is illiterate or cannot write in English.

ii. Compliance with the notice would result in physical or serious emotional harm to the child.

iii. The school prevented the parent from providing notice.

iv. The parents were not notified that they were required to provide notice.

Private School Students [§612(a)(10)(A)]
Effective June 4, 1997

To the extent consistent with the number and location of children with disabilities who are enrolled by their parents in private elementary or secondary schools, the LEA shall make provisions for the participation of these children in special education and related services based on the following:

1. Amounts expended for the provision of those services by the LEA for parentally placed private school students with disabilities shall be equal to a proportionate amount of federal funds.

2. To the extent consistent with law, special education and related services may be provided on the premises of private, including parochial schools.

Participation in State Assessment [§612(a)(17)]
Effective June 4, 1997

1. Children with disabilities are included in general state and LEA-wide assessment programs, with appropriate accommodations, where necessary.

   A. Participation will be noted on the child's IEP.

   B. Accommodations needed by the child will be noted on the child's IEP.

2. If the IEP team determines that the child will not participate in a particular state or LEA-wide assessment of student achievement (or part of the assessment), this fact must be noted on the child's IEP. The note must include:

   A. Why that assessment is not appropriate for the child; and

   B. How the child will be assessed.

3. The test results must be reported with the same frequency and in the same detail as those results for nondisabled children.

Reports on Performance [612(a)(17)(B)]
Effective July 1, 1998

1. No later than July 1, 1998, the State must begin reporting the performance of disabled children on required assessments.

2. Reports to the public on performance are required every two years, including data on goals to promote purposes of the IDEA and other state goals and standards.

3. Performance indicators to assess at a minimum include:

   A. Assessment performance;

   B. Drop-out rates; and

   C. Graduation rates.

Alternative Assessments [612(a)(17)(B)(iii)]
Effective July 1, 2000

No later than July 1, 2000, the State must begin reporting the progress of disabled children on alternative assessments.

Procedural Safeguards

Procedural Safeguards [§612(a)(10)(c); §615(a)-(j)&(j)]
Effective June 4, 1997

1. The SEA, State Agency, and LEA shall establish and maintain procedures to ensure that children with disabilities and their parents are informed of the procedural safeguards guaranteed to them under IDEA '97.

2. The types of procedural safeguards that are required for parents of a child with a disability include:

   A. The opportunity for the parents of a child with a disability to examine all records relating to their child.

   B. The right of the parents to participate in meetings dealing with identification, evaluation, educational placement, and the provision of FAPE to the child.

   C. The right of the parent to obtain an independent educational evaluation of the child.

   D. The right to prior written notice:

      i. Provided at all required times.

         - Whenever the LEA proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a FAPE to the child; and

         - Whenever the LEA refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a FAPE to the child.

      ii. Provided in their native language, unless it clearly is not feasible to do so.

      iii. Shall have the following content:

         - A description of the action proposed or refused by the agency;

         - An explanation of why the agency proposes or refuses to take the action;

         - A description of any other options that the agency considered and the reasons why those options were rejected;

         - A description of any other factors that are relevant to the agency's proposal or refusal;

BEST COPY AVAILABLE

- A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and if this notice is not an initial referral for evaluation the means by which a copy of a description of the procedural safeguards can be obtained; and

- Sources for parents to contact to obtain assistance in understanding the provisions of this part.

E. An opportunity for mediation.

i. Mediation must be available whenever a due process hearing is requested.

ii. Mediation must be voluntary for both parties. The LEA or SEA may require parents who refuse mediation to meet with a disinterested party, such as a representative of a parent training and information center or appropriate alternative dispute resolution entity, to discuss the use and the benefits of the mediation process.

iii. Attorneys are not barred from mediation but cannot recover attorney's fees for participation in mediation unless approved by state law.

iv. Mediation may not be used to delay or deny a parent's right to a due process hearing.

v. Mediation must be conducted by a qualified and impartial mediator who is:

- Trained in effective mediation techniques;

- Knowledgeable in special education law;

- Included on the list of mediators maintained by the state.

iv. The state shall cover the cost of mediation, including the costs of meeting for the parents with disinterested parties as noted above.

v. Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

vi. The mediation concludes with a written mediation agreement.

vii. All parties involved in the mediation process may be asked to sign a confidentiality pledge regarding discussions held as a part of the process and an agreement that information from the process may not be used as evidence in any subsequent due process hearings or civil proceedings.

F. The right to receive Procedural Safeguards Notice.

i. At a minimum at the following times:

- Initial referral for evaluation;
- Each notification of an IEP meeting;
- Reevaluation;
- Registration of a request for due process.

ii. Shall have an explanation of all procedural safeguards in the native language of the parent, unless it is clearly not feasible to do so, and shall be written in an easily understandable manner.

iii. Shall have content related to the following:

- Independent educational evaluation;
- Prior written notice;
- Parental consent;
- Access to educational records;
- Opportunity to present complaints;
- The child's placement during pendency of due process proceedings;
- Procedures to be followed for students who are subject to placement in an interim alternative educational setting;
- Requirements for unilateral placement by parents of children in private schools at public expense;
- Mediation;
- Due Process hearings, including disclosure of evaluation results and recommendation;
- State-level appeals;
- Civil actions; and
- Attorneys' fees.

G. The right to due process with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

   i. With the rule for exchange of evidence and for disclosure of evaluation results and recommendations at least five business days before the hearing. Information, which has not been disclosed, may be barred from introduction at the hearing.

   ii. With exceptions specified in 615(k) and unless all parties agree otherwise, the child with a disability will "stay put" in the then current educational placement of their child during pendency of due process.

   iii. With the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children.

   iv. With the right to present evidence and confront, cross-examine, and compel the attendance of witnesses.

   v. With the right to written, or at the option of the parents, electronic findings of face and decision.

   vi. With the right to state level appeal of the due process decision.

   vii. With the right to civil action to challenge the decision of the state level appeal.

H. Under certain circumstances the right to attorney's fees.

   i. An award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

   ii. An award of attorneys' fees and related fees may be made if the court finds that the SEA or the LEA unreasonably protracted the final resolution of the action.

   iii. No attorney's fees will be awarded for IEP meetings or mediation, unless the meeting is ordered as result of an administrative proceeding or judicial action.

   iv. Attorneys' fees may not be awarded for actions subsequent to the time of a written offer of settlement to a parent if that settlement is offered more than 10 days prior to the proceeding or if the offer is not accepted within 10 days or if the relief obtained by the parent is not more favorable to the parents that the offer of settlement.

   v. Reduction in attorney's fees may be made:

- When the parent unreasonably protracted the final resolution.
- When the amount of attorney's fees exceeds the prevailing hourly rate.
- When the time spent by the attorney and legal services furnished was excessive.
- When the attorney representing the parents failed to provide appropriate information to the LEA.

3. Additional procedures include:

   A. Those procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents. The person selected may not be an employee of the SEA, the LEA, or any other agency involved in the education or care of the child.

   B. Procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential) to the SEA or LEA in a due process complaint.

      i. The notice shall include:

         - The name of the child;
         - The child's address;
         - The name of the school attended by the child;
         - A description of the nature of the problem including facts relating to the problem;
         - A proposed resolution of the problem to the extent known and available to the parents at the time.

      ii. The SEA is required to develop a model form to assist parents in filing a due process complaint.

Transfer of Rights at Age of Majority [§615(m)]

Effective June 4, 1997

States may transfer all rights to the child with a disability when the child reaches the age of majority under state law except for a child with a disability who has been determined to be incompetent or who is determined not to have the ability to provide informed consent with respect to his/her educational program.

Discipline Provisions
(For the Child with a Disability)

Continuation of Services [§612(a)(1)(A)]
Effective June 4, 1997

A free appropriate public education (FAPE) shall be available to all children aged 3-21, including children with disabilities who have been suspended or expelled from school.

Placement in an Interim Alternative Educational Setting (IAES) [§615(k)(1)&(2)]
Effective June 4, 1997

1. School personnel may order a change in placement of a child with a disability:

    A. To an appropriate interim alternative educational setting or suspension for not more than 10 school days to the extent such alternative is applied to children without disabilities.

    B. To an appropriate interim alternative educational setting, to be determined by the IEP team, for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days if:

        i. The child carries a weapon to school or to a school function under the jurisdiction of an SEA or LEA; or

        ii. The child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or at a school function under the jurisdiction of an SEA or LEA.

    C. If school personnel order a change in placement, before or no later than 10 days after a suspension or change of placement to an alternative setting, the IEP team must convene to:

        i. Review the behavior plan, if a child already has such a plan in place and modify the plan as necessary to address the behavior which resulted in the suspension or change of placement;

        ii. Conduct a functional behavioral assessment immediately if the school has not already done so; and

        iii. Implement a behavioral intervention plan for the child, which includes the behavior that resulted in the suspension.

2. For a student who is determined to have committed a violation of weapons or drugs.

    A. This is described as a student who carries a dangerous weapon to school or to a school function, or a student who knowingly possesses or uses illegal drugs or sell or solicits the sale of a controlled substance while at school or a school function.

B. A hearing officer may order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer:

  i. Determines that the LEA has demonstrated by substantial evidence (defined as "beyond a preponderance of the evidence") that maintaining the current educational placement of such child is substantially likely to result in injury to the child or to others;

  ii. Considers the appropriateness of the child's current placement;

  iii. Considers whether the LEA has made reasonable efforts to minimize the risk of harm in the child's current educational placement, including the use of supplementary aids and services; and

  iv. Determines that the interim alternative educational setting meets the requirements noted in IDEA '97 for alternative settings.

Determination of Alternative Setting [§615(k)(3)]
Effective June 4, 1997

The alternative educational setting will comply with the following criteria:

1. Is selected by the IEP team.

2. Will enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in the IEP; and

3. Includes services and modifications designed to address the behavior so that it does not reoccur.

Manifestation Determination Review [§615(K)(4)-(7)]
Effective June 4, 1997

1. If a disciplinary change in placement is ordered for a child with a disability, including suspension for less than 10 school days, interim alternative educational placement, or move to another setting:

   A. Not later than the date on which the decision to take the action is made, the parents shall be notified of that decision and of all procedural safeguards accorded under the law; and

   B. Immediately, if possible, but in no case later than 10 school days after the date on which the decision to take the action is made; a review shall be conducted of the relationship between the child's disability and the behavior subject to the disciplinary review.

2. The manifestation determination must be conducted by the child's IEP team and other qualified personnel.

3. In conducting a manifestation determination, the IEP team may determine that the behavior of the child was not a manifestation of the child's disability only if the IEP team first considers, in terms of the behavior subject to disciplinary action, all relevant information, including:

   A. Evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;

   B. Observations of the child;

   C. The child's IEP and placement; and

   D. Then determines that:

      i. In relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

      ii. The child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

      iii. The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

4. Determination that the behavior was not a manifestation of the disability

   A. If the IEP team determines that the behavior was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except the child with a disability must continue to receive a FAPE.

   B. In addition, the LEA must ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

5. Parent appeal of manifestation determination

   A. If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing. An expedited hearing must be convened when requested by the parent.

B. In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the LEA has demonstrated that the child's behavior was not a manifestation of the child's disability.

6. Placement during appeals

A. When a parent requests a hearing to challenge a disciplinary action, placement in an interim alternative education setting, or a manifestation determination, the child shall remain in the interim alternative educational setting during the pendency of the hearing or until the expiration of the 45 day period, whichever occurs first, unless the parent and the LEA agree otherwise.

B. If a child is placed in an interim alternative education setting and the LEA proposes to change the child's placement after the expiration of the 45 days during the pendency of a hearing to challenge the proposed change in placement, the child shall return to the placement prior to the interim alternative education setting and remain there unless the LEA requests an expedited hearing.

7. Expedited hearings

A. If the LEA maintains that it is dangerous for the child to be in the current placement during the pendency of the hearing, the LEA may request an expedited hearing.

B. In such a hearing, the hearing officer must apply the "Light standards" established in this section to determine whether the alternative education setting or another appropriate placement should be ordered.

i. "Light standards" were established in Light v. Parkway C-2 School District, Special School District of St. Louis County, 21 IDELR 933 (8th Cir. 1994).

ii. Light established a two-part test to be met by a district prior to removing an allegedly dangerous student with a disability from school.

- Is maintaining the child in the current education placement substantially likely to result in injury to the child or to others?

- Did the district take reasonable steps to minimize the child's risk of injury?

Discipline Procedures
(For the Child with a Suspected Disability)

Regular Education Students Who Are Entitled to Assert IDEA Procedural Protections
[§615(k)(8)]
Effective June 4, 1997

1. A child who has not been determined to be eligible for special education and related services and who has engaged in behavior that violates any rule or code of conduct of the LEA may assert any of the disciplinary protections if the LEA had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

2. The LEA had knowledge that a child was a child with a disability if:

    A. The parent of the child has expressed concern in writing (unless the parent is illiterate) to the LEA that the child is in need of special education and related services;

    B. The behavior or performance of the child demonstrates the need for such services;

    C. The parent of the child has requested an evaluation of the child; or

    D. The teacher of the child, or other personnel of the LEA, has expressed concern about the behavior or performance of the child to the director of special education or other agency personnel.

3. If the LEA does not have knowledge that a child is a child with a disability prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as are applied to children without disabilities who engage in comparable behaviors.

4. If a parent requests an evaluation of a regular education child who is suspended or expelled, the evaluation must be expedited. Pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

5. If the child is determined to be a child with a disability, taking into consideration information from the evaluation and from information provided by the parents, the LEA shall provide special education and related services after development of an IEP.

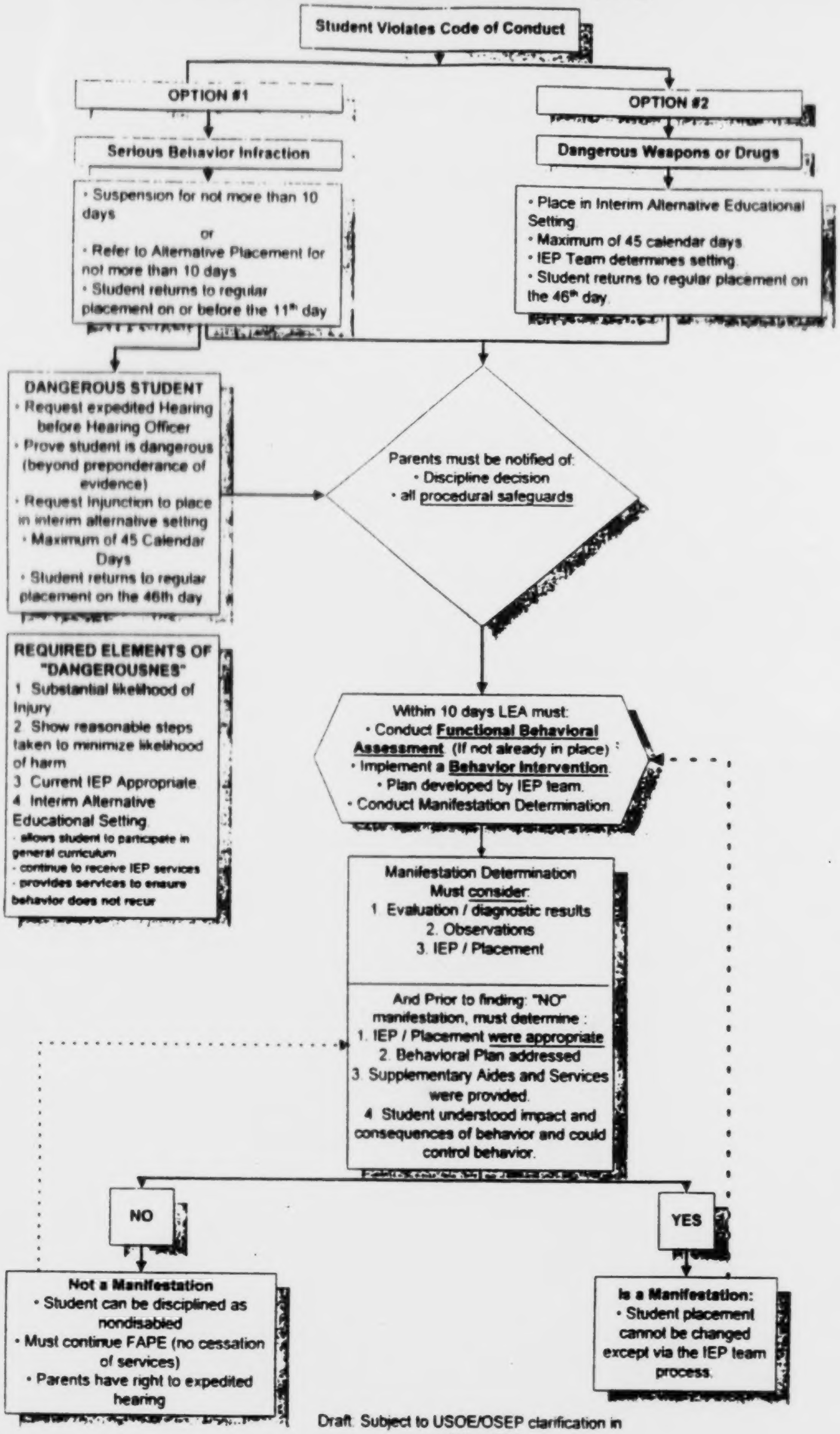
Suspension and Expulsion Rates [§612(a)(22)]
Effective June 4, 1997

1. Data on suspensions and expulsions of all students with and without disabilities will be required from each LEA to compare rates of suspensions and expulsions of students with and without disabilities to see if significant discrepancies exist.

2. If a discrepancy exists, an examination of policies, procedures, and practices must be conducted.

3. The SEA must examine data to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities.

ALTERNATIVE EDUCATIONAL SETTINGS



Student Violates Code of Conduct

OPTION #1

Serious Behavior Infraction

- Suspension for not more than 10 days

or

- Refer to Alternative Placement for not more than 10 days
- Student returns to regular placement on or before the 11th day

OPTION #2

Dangerous Weapons or Drugs

- Place in Interim Alternative Educational Setting.
- Maximum of 45 calendar days.
- IEP Team determines setting.
- Student returns to regular placement on the 46th day.

DANGEROUS STUDENT

- Request expedited Hearing before Hearing Officer
- Prove student is dangerous (beyond preponderance of evidence)
- Request Injunction to place in interim alternative setting
- Maximum of 45 Calendar Days
- Student returns to regular placement on the 46th day

REQUIRED ELEMENTS OF "DANGEROUSNES"

1. Substantial likelihood of injury
2. Show reasonable steps taken to minimize likelihood of harm
3. Current IEP Appropriate
4. Interim Alternative Educational Setting
   - allows student to participate in general curriculum
   - continue to receive IEP services
   - provides services to ensure behavior does not recur

Parents must be notified of:

- Discipline decision
- all procedural safeguards

Within 10 days LEA must:

- Conduct **Functional Behavioral Assessment**. (If not already in place)
- Implement a **Behavior Intervention**.
- Plan developed by IEP team.
- Conduct Manifestation Determination.

Manifestation Determination

Must consider:

1. Evaluation / diagnostic results
2. Observations
3. IEP / Placement

And Prior to finding: "NO" manifestation, must determine :

1. IEP / Placement were appropriate
2. Behavioral Plan addressed
3. Supplementary Aides and Services were provided.
4. Student understood impact and consequences of behavior and could control behavior.

NO

Not a Manifestation

- Student can be disciplined as nondisabled
- Must continue FAPE (no cessation of services)
- Parents have right to expedited hearing

YES

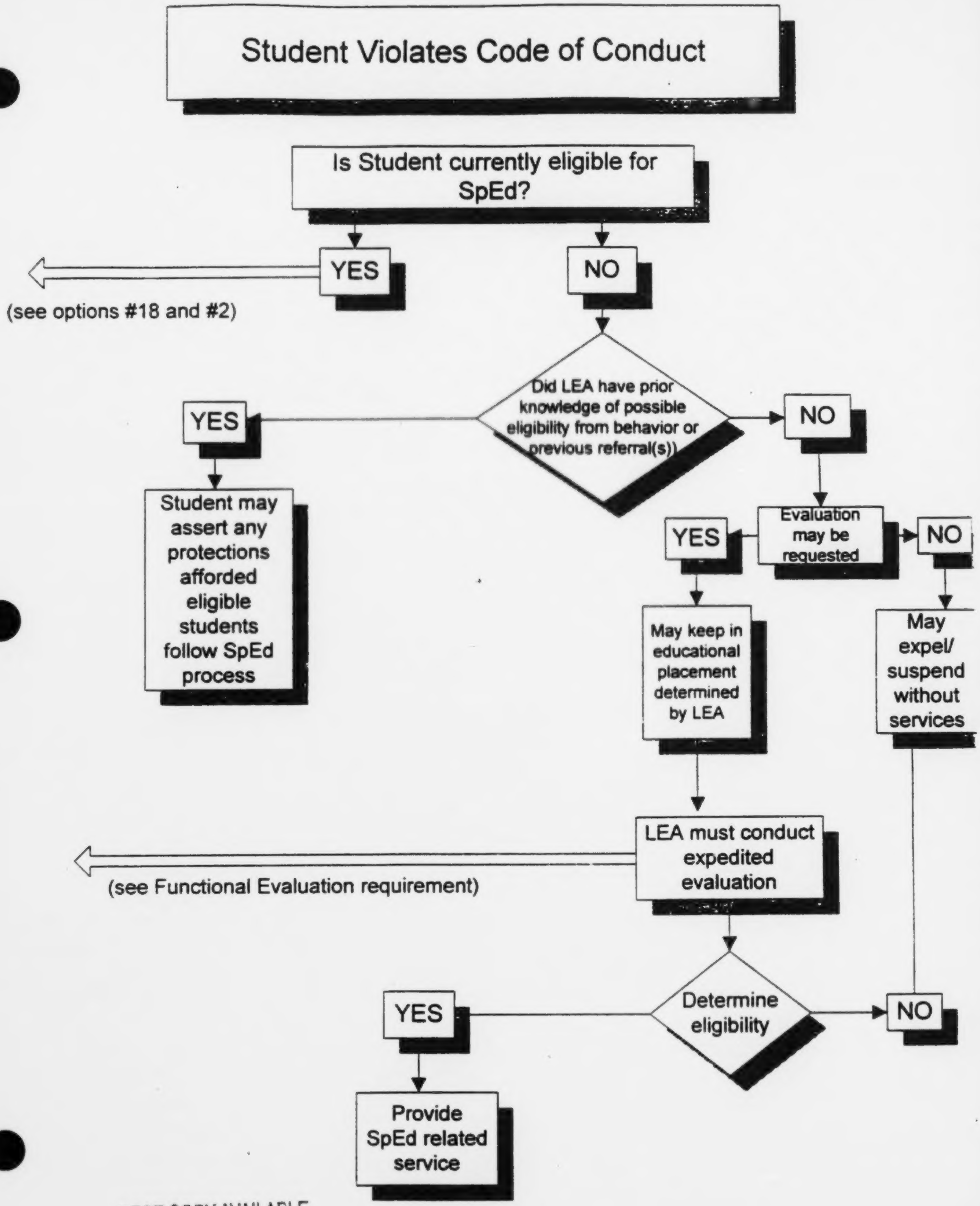
Is a Manifestation:

- Student placement cannot be changed except via the IEP team process.

Draft. Subject to USOE/OSEP clarification in regulation 7/97

BEST COPY AVAILABLE

Discipline Questions:


Student Violates Code of Conduct
Is Student currently eligible for SpEd?
YES
(see options #18 and #2)
NO
Did LEA have prior knowledge of possible eligibility from behavior or previous referral(s))
YES
Student may assert any protections afforded eligible students follow SpEd process
NO
Evaluation may be requested
YES
May keep in educational placement determined by LEA
NO
May expel/ suspend without services
LEA must conduct expedited evaluation
(see Functional Evaluation requirement)
Determine eligibility
YES
Provide SpEd related service
NO

BEST COPY AVAILABLE

Other Provisions

Definitions [§602(3)(A)&(B); 602(22)&(29)]
Effective June 4, 1997

Changes in definitions include the following:

1. Serious emotional disturbance becomes emotional disturbance.

2. States will have the discretion of using the developmental delay standard for determining eligibility for children aged three through nine.

3. The definition for related services now includes orientation and mobility training.

4. Supplementary aids and services is now defined as aids, services, and other supports that are provided in regular education classes or other educationally related settings to enable students with disabilities to be educated with nondisabled students to the maximum extent appropriate.

OSEP Policy Letters [§607(c)-(f)] §613(a)(5)]
Effective June 4, 1997

The Secretary of Education cannot use policy letters to establish a rule required for compliance or state eligibility without going through formal rule-making process.

Charter Schools [§613(a)(5); §613(e)(1)(B)]
Effective June 4, 1997

1. While charter schools are mentioned in IDEA '97, Arizona statutes treat all LEAs and charter schools as public schools. Therefore, all charter schools must comply with all requirements of IDEA '97. A possible variation may be created for those charter schools which hold charters granted by an LEA. In those cases, Section 613(a)(5) of IDEA '97 assigns the responsibility for the provision of services to children with disabilities attending those charter schools to the LEA along with the additional responsibility to provide funding to charter schools "…in the same manner as it provides those funds to its other schools."

2. As there is no longer the requirement that schools must generate at least $7,500 in funds under IDEA, charter schools can no longer be required to join with other schools to establish eligibility for funds under IDEA '97.

Referral to Law Enforcement/Judicial Authorities [§615(k)(9)]

Effective June 4, 1997

1. Nothing in this part shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to crimes committed by a child with a disability.

2. An agency reporting a crime by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

Transfer of Special Education and Disciplinary Records [§613(j)]

Effective June 4, 1997

The State may require LEAs to transmit records of previous disciplinary actions when the child transfers from one school to another (to the same extent that such information is transmitted for nondisabled children).

Corrections [§615(m)(1)(D); §613(j); §612(a)(11)(C); §612(a)(1)(B)(ii)(I&II)]

1. At the State's discretion, all rights may transfer to children who are incarcerated in adult or juvenile federal, state, or local correctional institutions (jails).

2. At the State's discretion, records of educational and disciplinary actions may transfer from the school to relevant correctional authorities.

3. While under IDEA '97, the governor or designee may assign responsibility for the provision of special education and related services in adult prisons to any public agency, in Arizona that responsibility has been assigned through statute to the Department of Corrections.

4. FAPE must be made available unless an inmate in an adult correctional facility was not identified as having a disability or did not have an IEP prior to incarceration.

Children with Disabilities in Adult Prisons [§614(d)(6)]

Effective June 4, 1997

The following requirements do not apply to children with disabilities who are convicted as adults under state law and incarcerated in adult prisons.

1. Participation in general assessments;

2. Transition planning and services, with respect to such children whose eligibility will end, because they will turn 22 years of age, before they will be released from prison; and

3. LRE, if the State has demonstrated a bona fide security or compelling penalogical interest that cannot otherwise be accommodated.

Funding [612(a)(19); §613(a)(1)(D); §613(a)(2)(B)-(C); §613(a)(4)(A); §613(b)]

Effective June 4, 1997

1. For the immediate future, child count will continue to be used as the basis for distribution of federal special education funds.

2. When congressional appropriations exceed $4.9 billion, a change in the funding formula will be triggered. At that point the formula will be based on each state's census and poverty level.

   A. 85% of the excess amount will be distributed based on general child population data; and

   B. 15% will be distributed based on a poverty factor.

3. 25% state set aside is maintained at FY'97 levels with adjustments in future years at the lesser of percentage increase of federal appropriations or rate of inflation.

4. A one-year waiver from state maintenance of effort requirement may be granted for exceptional or uncontrollable circumstances or clear and convincing evidence that all children have FAPE available.

5. Local maintenance of effort requirements are modified to allow reduction of expenditures attributable to:

   A. The voluntary departure by retirement or departure for just cause of special education personnel;

   B. A decrease in enrollment of students with disabilities;

   C. The termination of obligation to provide an exceptionally costly program to a student; or

   D. The termination of costly expenditures for long-term projects.

6. Incidental benefit

   Part B funds can be used for services in a regular class to a child with a disability even if children who are not disabled benefit.

7. LEA application

   All LEAs must submit an application for funding only once under IDEA '97. These applications shall remain in place until assurances and necessary modifications are required.

Data Requirements [§618(a)(1)(A)]
Effective June 4, 1997

1. In addition to collecting data to determine discrepancies in suspension and expulsion rates and the census count for December 1 reporting requirements, the State, through the LEAs or other agencies, will gather annually data on the number of children with disabilities by race, ethnicity, and disability category:

    A. Who, if between birth and age three,

        i. Are receiving early intervention services;

        ii. Are at risk of having substantial developmental delays and who are receiving early intervention services.

    B. Who, if between the ages of three through 21,

        i. Are receiving FAPE;

        ii. Are participating in regular education classes;

        iii. Are receiving services in separate class facilities or public or private residential facilities;

        iv. Have stopped receiving services and why, whether it is because of program completion or for any other reason, (from ages 14 through 21); and

        v. Have been removed to an interim alternative educational setting.

2. Data analysis ***[§618(c)]***

    A. Examination of the data is done to determine over or under representation based on race, disability category, and/or educational settings.

    B. If disproportionality is identified, a review and revision of policies and procedures shall be initiated.

Additional Data Requirements [§612(a)(16)]
Effective July 1, 1998

3. Data requirements will be broadened

    A. To include performance on goals and progress indicators for state assessments.

    B. To include a measure of the State's progress in improving participation of children with disabilities in assessments and in decreasing drop-out rates, and increasing graduation rates for children with disabilities.

Interagency Agreements (IGAs) [§612(a)(12)(A)]
Effective June 4, 1997

1. The Chief Executive Officer or designee shall ensure that interagency agreements (IGAs) or other mechanisms for interagency coordination are in effect between the SEA and appropriate agencies to ensure that all services needed to provide a free appropriate public education are available.

2. The content of IGAs shall include:

   A. Defined financial responsibility;

   B. Defined services responsibility; and

   C. A process for resolving interagency disputes, including procedures under which LEAs may initiate proceedings to secure reimbursement from other agencies that have failed to provide services.

3. Agreements may be established through state statute or regulation, through signed IGAs, or through other appropriate written methods.

Comprehensive System of Staff Development (CSPD) [§611(f); §612(a)(14)&(15); §613(g); §651(b)]
Effective July 1, 1998

1. Plans must be in place to ensure an adequate supply of qualified personnel. States will develop an application for competitive grant funding through a *State Improvement Plan (SIP)* emphasizing results for students with disabilities in implementing strategies for:

   A. Adopting best practices, materials, and technology;

   B. Expanding inservice and preserving training of personnel;

   C. Developing IGAs and/or direct services to correctional facilities and alternative programs; and

   D. Providing alternative dispute resolution.

2. School-based improvement plans may be developed consistent with the *State Improvement Plan* and funded by the SEA to improve educational or transitional results for children with disabilities as designed, implemented, and evaluated by a school-based standing panel.

Penalties for Failure to Comply with the IDEA Amendments of 1997 [§613; §616]
Effective June 4, 1997

1. Money damages. There is the possibility of compensatory and punitive damages, including individual liability of administrators and teachers who willfully disregard the law.

2. Federal and state funding may be terminated.

Section H

I.D.E.A. REGULATIONS

Regulations Implementing IDEA Part B

34 C.F.R. Part 300

Assistance to States for Education of Children with Disabilities

Subpart A – General

PURPOSE, APPLICABILITY, AND REGULATIONS THAT APPLY TO THIS PROGRAM

§300.1 Purpose.

The purpose of this part is –

(a) To ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs;

(b) To ensure that the rights of children with disabilities and their parents are protected;

(c) To assist States and localities to provide for the education of all children with disabilities; and

(d) To assess and ensure the effectiveness of efforts to educate those children.

(Authority: 20 U.S.C. 1401 Note)

§300.2 Applicability to State, local, and private agencies.

(a) States. This part applies to each State that receives payments under Part B of the Act.

(b) Public agencies within the State. The State plan is submitted by the State educational agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of children with disabilities. These would include:

(1) The State educational agency;

(2) Local educational agencies and intermediate educational units;

(3) Other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for students with deafness or students with blindness); and

(4) State correctional facilities.

(c) Private schools and facilities. Each public agency in the State is responsible for ensuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

(See §§300.400-300.402)

(Authority: 20 U.S.C. 1412(1), (6); 1413(a); 1413(a)(4)(B))

Note: The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

§300.3 Regulations that apply.

The following regulations apply to this program:

(a) 34 CFR Part 76 (State-Administered Programs) except for §§76.780-76.782.

(b) 34 CFR Part 77 (Definitions).

(c) 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(d) 34 CFR Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(e) 34 CFR Part 81 (General Education Provisions Act – Enforcement).

(f) 34 CFR Part 82 (New Restrictions on Lobbying).

(g) 34 CFR Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(h) 34 CFR Part 86 (Drug-Free Schools and Campuses).

(i) The regulations in this part – 34 CFR Part 300 (Assistance to States for Education of Children with Disabilities).

(Authority: 20 U.S.C. 1221e-3(a)(1))

DEFINITIONS

Note 1: Definitions of terms that are used throughout these regulations are included in this subpart. Other terms are defined in the specific subparts in which they are used. Below is a list of those terms and the specific sections in which they are defined:

Appropriate professional requirements in the State (§300.153(a)(1))
Average per pupil expenditure in public elementary and secondary schools in the United States (§300.701(c))
Consent (§300.500)
Destruction (§300.560)
Direct services (§300.370(b)(1))
Education records (§300.560)
Evaluation (§300.500)
First priority children (§300.320(a))
Highest requirements in the State applicable to a specific profession or discipline (§300.153(a)(2))
Independent educational evaluation (§300.503(a)(3)(i))
Individualized education program (§300.340)
Participating agency, as used in the IEP requirements in §§300.346 and 300.347 (§300.340(b))
Participating agency, as used in the confidentiality requirements in §§300.560-300.576 (§300.560)
Party or parties (§300.584(a))
Personally identifiable (§300.500)
Private school children with disabilities (§300.450)
Profession or discipline (§300.153(a)(3))
Public expense (§300.503(a)(3)(ii))
Second priority children (§300.320(b))
Special definition of "State" (§300.700)
State-approved or recognized certification, licensing, registration, or other comparable requirements (§300.153(a)(4))
Support services (§300.370(b)(2))

Note 2: Below are abbreviations for selected terms that are used throughout these regulations:

"FAPE" means "free appropriate public education."
"IEP" means "individualized education program."
"IEU" means "intermediate educational unit."
"LEA" means "local educational agency."
"LRE" means "least restrictive environment."
"SEA" means "State educational agency."

As appropriate, each abbreviation is used interchangeably with its nonabbreviated term.

§300.4 Act.

As used in this part, "Act" means the Individuals with Disabilities Education Act, formerly the Education of the Handicapped Act.

(Authority: 20 U.S.C. 1400)

§300.5 Assistive technology device.

As used in this part, "assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially

©1993, EDLAW, Inc. ,
all rights reserved
Reproduced by permission

off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of children with disabilities.

(Authority: 20 U.S.C. 1401(a)(25))

§300.6 Assistive technology service.

As used in this part, "assistive technology service" means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes —

(a) The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;

(b) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;

(c) Selecting, designing, fitting, customizing, adapting, applying, retaining, repairing, or replacing assistive technology devices;

(d) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(e) Training or technical assistance for a child with a disability or, if appropriate, that child's family; and

(f) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of children with disabilities.

(Authority: 20 U.S.C. 1401(a)(26))

Note: The definitions of "assistive technology device" and "assistive technology service" used in this part are taken directly from section 602(a)(25)-(26) of the Act, but in accordance with Part B, the statutory reference to "individual with a disability" has been replaced with "child with a disability." The Act's definitions of "assistive technology device" and "assistive technology service" incorporate verbatim the definitions of these terms used in the Technology-Related Assistance for Individuals with Disabilities Act of 1988.

§300.7 Children with disabilities.

(a)(1) As used in this part, the term "children with disabilities" means those children evaluated in accordance with §§300.530-300.534 as having mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, specific learning disabilities, deaf-blindness, or multiple disabilities, and who because of those impairments need special education and related services.

(2) The term "children with disabilities" for children aged 3 through 5 may, at a State's discretion, include children —

(i) Who are experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

(ii) Who, for that reason, need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) "Autism" means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child's educational performance is adversely affected primarily because the child has a serious emotional disturbance, as defined in paragraph (b)(9) of this section.

(2) "Deaf-blindness" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(3) "Deafness" means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance.

(4) "Hearing impairment" means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section.

(5) "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance.

(6) "Multiple disabilities" means concomitant impairments (such as mental retardation-blindness, mental retardation-orthopedic impairment, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blindness.

(7) "Orthopedic impairment" means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

(8) "Other health impairment" means having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes that adversely affects a child's educational performance.

(9) "Serious emotional disturbance" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance —

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have a serious emotional disturbance.

(10) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not apply to children who have learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(11) "Speech or language impairment" means a communication disorder such as stuttering, impaired articulation, a language impairment, or a voice impairment that adversely affects a child's educational performance.

(12) "Traumatic brain injury" means an acquired injury to the brain caused by an external physical force, resulting in total or partial

©1993, EDLAW,Inc.

BEST COPY AVAILABLE

functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative, or brain injuries induced by birth trauma.

(13) "Visual impairment including blindness" means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.

(Authority: 20 U.S.C. 1401(a)(1))

Note: If a child manifests characteristics of the disability category "autism" after age 3, that child still could be diagnosed as having "autism" if the criteria in paragraph (b)(1) of this section are satisfied.

§300.8 Free appropriate public education.

As used in this part, the term "free appropriate public education" means special education and related services that –

(a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part;

(c) Include preschool, elementary school, or secondary school education in the State involved; and

(d) Are provided in conformity with an IEP that meets the requirements of §§300.340-300.350.

(Authority: 20 U.S.C. 1401(a)(18))

§300.9 Include.

As used in this part, the term "include" means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(Authority: 20 U.S.C. 1417(b))

§300.10 Intermediate educational unit.

As used in this part, the term "intermediate educational unit" means any public authority, other than an LEA, that –

(a) Is under the general supervision of an SEA;

(b) Is established by State law for the purpose of providing free public education on a regional basis; and

(c) Provides special education and related services to children with disabilities within that State.

(Authority: 20 U.S.C. 1401(a)(23))

§300.11 Local educational agency.

(a) [Reserved]

(b) For the purposes of this part, the term "local educational agency" also includes intermediate educational units. (Authority: 20 U.S.C. 1401(a)(8))

§300.12 Native language.

As used in this part, the term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act, which provides as follows:

The term "native language," when used with reference to an individual of limited English proficiency, means the language normally used by that individual, or in the case of a child, the language normally used by the parents of the child.

(Authority: 20 U.S.C. 3283(a)(2); 1401(a)(22))

Note: Section 602(a)(22) of the Act states that the term "native language" has the same meaning as the definition from section 703(a)(2) of the Bilingual Education Act. (The term is used in the prior notice and evaluation sections under §300.505(b)(2) and §300.532(a)(1).) In using the term, the Act does not prevent the following means of communication:

(1) In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(2) For individuals with deafness or blindness, or for individuals with no written language, the mode of communication would be that normally used by the individual (such as sign language, braille, or oral communication).

§300.13 Parent.

As used in this part, the term "parent" means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with §300.514. The term does not include the State if the child is a ward of the State.

(Authority: 20 U.S.C. 1415)

Note: The term "parent" is defined to include persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare.

§300.14 Public agency.

As used in this part, the term "public agency" includes the SEA, LEAs, IEUs, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.

(Authority: 20 U.S.C. 1412(2)(B); 1412(6); 1413(a))

§300.15 Qualified.

As used in this part, the term "qualified" means that a person has met SEA approved or recognized certification, licensing, registration, or other comparable requirements that apply to the area in which he or she is providing special education or related services.

(Authority: 20 U.S.C. 1417(b))

§300.16 Related services.

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) "Audiology" includes –

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification and assessment of disabilities in children" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

©1993, EDLAW,Inc.

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

(5) "Occupational therapy" includes –

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means services provided by a qualified physical therapist.

(8) "Psychological services" includes –

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents.

(9) "Recreation" includes –

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "Rehabilitation counseling services" means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to students with disabilities by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended.

(11) "School health services" means services provided by a qualified school nurse or other qualified person.

(12) "Social work services in schools" includes –

(i) Preparing a social or developmental history on a child with a disability;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program.

(13) "Speech pathology" includes –

(i) Identification of children with speech or language impairments;

(ii) Diagnosis and appraisal of specific speech or language impairments;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;

(iv) Provision of speech and language services for the habilitation or prevention of communicative impairments; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

(14) "Transportation" includes –

(i) Travel to and from school and between schools;

(ii) Travel in and around school buildings; and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

(Authority: 20 U.S.C. 1401(a)(17))

Note: With respect to related services, the Senate Report states:

> The Committee bill provides a definition of related services, making clear that all such related services may not be required for each individual child and that such term includes early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions.

(S. Rep. No. 94-168, p. 12 (1975))

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a child with a disability to benefit from special education.

There are certain kinds of services that might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors, and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under this part may include appropriate administrative and supervisory activities that are necessary for program planning, management, and evaluation.

§300.17 Special education.

(a)(1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including –

(A) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) Instruction in physical education.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, and is considered special education rather than a related service under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.

(b) The terms in this definition are defined as follows:

(1) "At no cost" means that all specially designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

(2) "Physical education" is defined as follows:

(i) The term means the development of –

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adaptive physical education, movement education, and motor development.

(Authority: 20 U.S.C. 1401(a)(16))

(3) "Vocational education" means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(Authority: 20 U.S.C. 1401(16))

Note 1: The definition of special education is a particularly important one under these regulations, since a child does not have a disability under this part unless he or she needs special education. (See the definition of children with disabilities in §300.7.) The definition of related services (§300.16) also depends on this definition, since a related service must be necessary for a child to benefit from special education. Therefore, if a

©1993, EDLAW, Inc.

child does not need special education, there can be no related services, and the child is not a child with a disability and is therefore not covered under the Act.

Note 2: The above definition of vocational education is taken from the Vocational Education Act of 1963, as amended by Pub. L. 94-482. Under that Act, "vocational education" includes industrial arts and consumer and homemaking education programs.

§300.18 Transition services.

(a) As used in this part, "transition services" means a coordinated set of activities for a student, designed within an outcome-oriented process, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.

(b) The coordinated set of activities described in paragraph (a) of this section must –

(1) Be based on the individual student's needs, taking into account the student's preferences and interests; and

(2) Include –

(i)Instruction;

(ii) Community experiences;

(iii) The development of employment and other post-school adult living objectives; and

(iv) If appropriate, acquisition of daily living skills and functional vocational evaluation.

(Authority: 20 U.S.C. 1401(a)(19))

Note: Transition services for students with disabilities may be special education, if they are provided as specially designed instruction, or related services, if they are required to assist a student with a disability to benefit from special education. The list of activities in paragraph (b) is not intended to be exhaustive.

Subpart B – State Plans and Local Educational Agency Applications

STATE PLANS — GENERAL

§300.110 Condition of assistance.

In order to receive funds under Part B of the Act for any fiscal year, a State must submit a State plan to the Secretary through its SEA, which plan shall be effective for a period of 3 fiscal years.

(Authority: 20 U.S.C. 1231g, 1412, 1413)

§300.111 Contents of plan.

Each State plan must contain the provisions required in §§300.121-300.154.

(Authority: 20 U.S.C. 1412, 1413)

STATE PLANS — CONTENTS

§300.121 Right to a free appropriate public education.

(a) Each State plan must include information that shows that the State has in effect a policy that ensures that all children with disabilities have the right to FAPE within the age ranges and timelines under §300.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State documents that show the source of the policy.

(c) The information must show that the policy –

(1) Applies to all public agencies in the State;

(2) Applies to all children with disabilities;

(3) Implements the priorities established under §§300.320-300.324; and

(4) Establishes timelines for implementing the policy, in accordance with §300.122.

(Authority: 20 U.S.C. 1412(1), (2)(B), (6); 1413(a)(1))

§300.122 Timelines and ages for free appropriate public education.

(a) General. Each State plan must include in detail the policies and procedures that the State will undertake or has undertaken in order to ensure that FAPE is available for all children with disabilities aged 3 through 18 within the State not later than September 1, 1978, and for all children with disabilities aged 3 through 21 within the State not later than September 1, 1980.

(b) Documents relating to timelines. Each State plan must include a copy of each State statute, court order, Attorney General decision, and other State documents that demonstrate that the State has established timelines in accordance with paragraph (a) of this section.

(c) Exception. The requirement in paragraph (a) of this section does not apply to a State with respect to children with disabilities aged 3, 4, 5, 18, 19, 20, or 21 to the extent that the requirement would be inconsistent with State law or practice, or the order of any court, respecting public education for one or more of those age groups in the State.

(d) Documents relating to exceptions. Each State plan must –

(1) Describe in detail the extent that the exception in paragraph (c) of this section applies to the State; and

(2) Include a copy of each State law, court order, and other documents that provide a basis for the exception.

(Authority: 20 U.S.C. 1412(2)(B))

§300.123 Full educational opportunity goal.

Each State plan must include in detail the policies and procedures that the State will undertake, or has undertaken, in order to ensure that the State has a goal of providing full educational opportunity to all children with disabilities aged birth through 21.

(Authority: 20 U.S.C. 1412(2)(A))

§300.124 [Reserved]

§300.125 Full educational opportunity goal – timetable.

Each State plan must contain a detailed timetable for accomplishing the goal of providing full educational opportunity for all children with disabilities.

(Authority: 20 U.S.C. 1412(2)(A))

§300.126 Full educational opportunity goal – facilities, personnel, and services.

Each State plan must include a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet the goal of providing full educational opportunity for all children with disabilities.

(Authority: 20 U.S.C. 1412(2)(A))

©1993, EDLAW,Inc.

§300.127 Priorities.

Each State plan must include information that shows that –

(a) The State has established priorities that meet the requirements of §§300.320-300.324;

(b) The State priorities meet the timelines under §300.122; and

(c) The State has made progress in meeting those timelines.

(Authority: 20 U.S.C. 1412(3))

§300.128 Identification, location, and evaluation of children with disabilities.

(a) General requirement. Each State plan must include in detail the policies and procedures that the State will undertake, or has undertaken, to ensure that –

(1) All children with disabilities, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(b) Information. Each State plan must:

(1) Designate the State agency (if other than the SEA) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section.

(2) Name each agency that participates in the planning and implementation and describe the nature and extent of its participation.

(3) Describe the extent that –

(i) The activities described in paragraph (a) of this section have been achieved under the current State plan; and

(ii) The resources named for these activities in that plan have been used.

(4) Describe each type of activity to be carried out during the next school year, including the role of the agency named under paragraph (b)(1) of this section, timelines for completing those activities, resources that will be used, and expected outcomes.

(5) Describe how the policies and procedures under paragraph (a) of this section will be monitored to ensure that the SEA obtains –

(i) The number of children with disabilities within each disability category that have been identified, located, and evaluated; and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures.

(6) Describe the method the State uses to determine which children are currently receiving special education and related services and which children are not receiving special education and related services.

(Authority: 20 U.S.C. 1412(2)(C))

Note 1: The State is responsible for ensuring that all children with disabilities are identified, located, and evaluated, including children in all public and private agencies and institutions in the State. Collection and use of data are subject to the confidentiality requirements of §§300.560- 300.576.

Note 2: Under both Parts B and H of the Act, States are responsible for identifying, locating, and evaluating infants and toddlers from birth through 2 years of age who have disabilities or who are suspected of having disabilities. In States where the SEA and the State's lead agency for the Part H program are different and the Part H lead agency will be participating in the child find activities described in paragraph (a), the nature and extent of the Part H lead agency's participation must, under paragraph (b)(2), be included in the State plan. With the SEA's agreement, the Part H lead agency's participation may include the actual implementation of child find activities for infants and toddlers. The use of an interagency agreement or other mechanism for providing for the Part H lead agency's participation would not alter or diminish the responsibility of the SEA to ensure compliance with all child find requirements, including the requirement in paragraph (a)(1) that all children with disabilities who are in need of special education and related services are evaluated.

§300.129 Confidentiality of personally identifiable information.

(a) Each State plan must include in detail the policies and procedures that the State will undertake, or has undertaken, in order to ensure the protection of the confidentiality of any personally identifiable information collected, used, or maintained under this part.

(b) The Secretary shall use the criteria in §§300.560-300.576 to evaluate the policies and procedures of the State under paragraph (a) of this section.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

Note: The confidentiality regulations were published in the Federal Register in final form on February 27, 1976 (41 FR 8603- 8610), and met the requirements of Part B of the Act. Those regulations are incorporated in §§300.560-300.576.

§300.130 Individualized education programs.

(a) Each State plan must include information that shows that each public agency in the State maintains records of the IEP for each child with a disabilities, and each public agency establishes, reviews, and revises each program as provided in §§300.340-300.350.

(b) Each State plan must include –

(1) A copy of each State statute, policy, and standard that regulates the manner in which IEPs are developed, implemented, reviewed, and revised; and

(2) The procedures that the SEA follows in monitoring and evaluating those programs.

(Authority: 20 U.S.C. 1412(4), 1413(a)(1))

§300.131 Procedural safeguards.

Each State plan must include procedural safeguards that ensure that the requirements of §§300.500-300.514 are met.

(Authority: 20 U.S.C. 1412(5)(A))

§300.132 Least restrictive environment.

(a) Each State plan must include procedures that ensure that the requirements of §§300.550-300.556 are met.

(b) Each State plan must include the following information:

(1) The number of children with disabilities in the State, within each disability category, who are participating in regular education programs, consistent with §§300.550-300.556.

(2) The number of children with disabilities who are in separate classes or separate school facilities, or who are otherwise removed from the regular education environment.

(Authority: 20 U.S.C. 1412(5)(B))

§300.133 Protection in evaluation procedures.

Each State plan must include procedures that ensure that the requirements of §§300.530-300.534 are met.

(Authority: 20 U.S.C. 1412(5)(C))

§300.134 Responsibility of State educational agency for all educational programs.

(a) Each State plan must include information that shows that the requirements of §300.600 are met.

(b) The information under paragraph (a) of this section must include a copy of each State statute, State regulation, signed agreement between respective agency officials, and any other documents that show compliance with that paragraph.

(Authority: 20 U.S.C. 1412(6))

BEST COPY AVAILABLE

©1993, EDLAW,Inc.

§300.135 [Reserved]

§300.136 Implementation procedures – State educational agency.

Each State plan must describe the procedures the SEA follows to inform each public agency of its responsibility for ensuring effective implementation of procedural safeguards for the children with disabilities served by that public agency.

(Authority: 20 U.S.C. 1412(6))

§300.137 Procedures for consultation.

Each State plan must include an assurance that in carrying out the requirements of section 612 of the Act, procedures are established for consultation with individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities and parents of children with disabilities.

(Authority: 20 U.S.C. 1412(7)(A))

§300.138 Other Federal programs.

Each State plan must provide that programs and procedures are established to ensure that funds received by the State or any public agency in the State under any other Federal program, including Subpart 2 of Part D of Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965, under which there is specific authority for assistance for the education of children with disabilities, are used by the State, or any public agency in the State, only in a manner consistent with the goal of providing FAPE for all children with disabilities, except that nothing in this section limits the specific requirements of the laws governing those Federal programs.

(Authority: 20 U.S.C. 1413(a)(2))

§300.139 Comprehensive system of personnel development.

Each State plan must include the procedures required under §§300.380-300.383.

(Authority: 20 U.S.C. 1413(a)(3))

§300.140 Private schools.

Each State plan must include policies and procedures that ensure that the requirements of §§300.400-300.403 and §§300.450- 300.452 are met.

(Authority: 20 U.S.C. 1413(a)(4))

§300.141 Recovery of funds for misclassified children.

Each State plan must include policies and procedures that ensure that the State seeks to recover any funds provided under Part B of the Act for services to a child who is determined to be erroneously classified as eligible to be counted under section 611(a) or (d) of the Act.

(Authority: 20 U.S.C. 1413(a)(5))

§§300.142-300.143 [Reserved]

§300.144 Hearing on application.

Each State plan must include procedures to ensure that the SEA does not take any final action with respect to an application submitted by an LEA before giving the LEA reasonable notice and an opportunity for a hearing under §76.401(d) of this title.

(Authority: 20 U.S.C. 1413(a)(8))

§300.145 Prohibition of commingling.

Each State plan must provide assurance satisfactory to the Secretary that funds provided under Part B of the Act are not commingled with State funds.

(Authority: 20 U.S.C. 1413(a)(9))

Note: This assurance is satisfied by the use of a separate accounting system that includes an audit trail of the expenditure of the Part B funds. Separate bank accounts are not required. (See 34 CFR §76.702 (Fiscal control and fund accounting procedures).)

§300.146 Annual evaluation.

Each State plan must include procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of children with disabilities, including evaluation of IEPs.

(Authority: 20 U.S.C. 1413(a)(11))

§300.147 State advisory panel.

Each State plan must provide that the requirements of §§300.650-300.653 are met.

(Authority: 20 U.S.C. 1413(a)(12))

§300.148 Policies and procedures for use of Part B funds.

Each State plan must set forth policies and procedures designed to ensure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B, with particular attention given to sections 611(b), 611(c), 611(d), 612(2), and 612(3) of the Act.

(Authority: 20 U.S.C. 1413(a)(1))

§300.149 Description of use of Part B funds.

(a) State allocation. Each State plan must include the following information about the State's use of funds under §300.370 and §300.620:

(1) A list of administrative positions, and a description of duties for each person whose salary is paid in whole or in part with those funds.

(2) For each position, the percentage of salary paid with those funds.

(3) A description of each administrative activity the SEA will carry out during the next school year with those funds.

(4) A description of each direct service and each support service that the SEA will provide during the next period covered by the State plan with those funds, and the activities the State advisory panel will undertake during that period with those funds.

(b) Local educational agency allocation. Each State plan must include –

(1) An estimate of the number and percent of LEAs in the State that will receive an allocation under this part (other than LEAs that submit a consolidated application);

(2) An estimate of the number of LEAs that will receive an allocation under a consolidated application;

(3) An estimate of the number of consolidated applications and the average number of LEAs per application; and

(4) A description of direct services that the SEA will provide under §300.360.

(Authority: 20 U.S.C.1412(6))

§300.150 State-level nonsupplanting.

Each State plan must provide assurance satisfactory to the Secretary that funds provided under this part will be used so as to supplement and increase the level of Federal (other than funds available under this part), State, and local funds – including funds that are not under the direct control of the SEA or LEAs – expended for special education and related services provided to children with disabilities under this part and in no case to supplant those Federal (other than funds available under this part), State, and local funds unless a waiver is granted in accordance with §300.589.

(Authority: 20 U.S.C. 1413(a)(9))

Note: This requirement is distinct from the LEA nonsupplanting provision already contained in these regulations at §300.230. Under this State-level provision, the State must assure that Part B funds distributed to LEAs and IEUs will be used to supplement and not supplant other Federal, State, and local funds (including funds not under the control of educational agencies) that would have been expended for special education and related services provided to children with disabilities in the

©1993, EDLAW,Inc.

absence of the Part B funds. The portion of Part B funds that are not distributed to LEAs or IEUs under the statutory formula (20 U.S.C. 1411(d)) are not subject to this nonsupplanting provision. See 20 U.S.C. 1411(c)(3). States may not permit LEAs or IEUs to use Part B funds to satisfy a financial commitment for services that would have been paid for by a health or other agency pursuant to policy or practice but for the fact that these services are now included in the IEPs of children with disabilities. (H. R. Rep. No. 860, 99th Cong., 21-22 (1986))

§300.151 Additional information if the State educational agency provides direct services.

If an SEA provides FAPE for children with disabilities or provides them with direct services, its State plan must include the information required under §§300.226, 300.227, 300.231, and 300.235.

(Authority: 20 U.S.C. 1413(b))

§300.152 Interagency agreements.

(a) Each State plan must set forth policies and procedures for developing and implementing interagency agreements between —

(1) The SEA; and

(2) All other State and local agencies that provide or pay for services required under this part for children with disabilities.

(b) The policies and procedures referred to in paragraph (a) of this section must —

(1) Describe the role that each of those agencies plays in providing or paying for services required under this part for children with disabilities; and

(2) Provide for the development and implementation of interagency agreements that —

(i) Define the financial responsibility of each agency for providing children with disabilities with FAPE;

(ii) Establish procedures for resolving interagency disputes among agencies that are parties to the agreements; and

(iii) Establish procedures under which LEAs may initiate proceedings in order to secure reimbursement from agencies that are parties to the agreements or otherwise implement the provisions of the agreements.

(Authority: 20 U.S.C. 1413(a)(13))

§300.153 Personnel standards.

(a) As used in this part:

(1) "Appropriate professional requirements in the State" means entry level requirements that —

(i) Are based on the highest requirements in the State applicable to the profession or discipline in which a person is providing special education or related services; and

(ii) Establish suitable qualifications for personnel providing special education and related services under this part to children and youth with disabilities who are served by State, local, and private agencies (see §300.2).

(2) "Highest requirements in the State applicable to a specific profession or discipline" means the highest entry-level academic degree needed for any State approved or recognized certification, licensing, registration, or other comparable requirements that apply to that profession or discipline.

(3) "Profession or discipline" means a specific occupational category that —

(i) Provides special education and related services to children with disabilities under this part;

(ii) Has been established or designated by the State; and

(iii) Has a required scope of responsibility and degree of supervision.

(4) "State approved or recognized certification, licensing, registration, or other comparable requirements" means the requirements that a State legislature either has enacted or has authorized a State agency to promulgate through rules to establish the entry-level standards for employment in a specific profession or discipline in that State.

(b)(1) Each State plan must include policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained.

(2) The policies and procedures required in paragraph (b)(1) of this section must provide for the establishment and maintenance of standards that are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements that apply to the profession or discipline in which a person is providing special education or related services.

(c) To the extent that a State's standards for a profession or discipline, including standards for temporary or emergency certification, are not based on the highest requirements in the State applicable to a specific profession or discipline, the State plan must include the steps the State is taking and the procedures for notifying public agencies and personnel of those steps and the timelines it has established for the retraining or hiring of personnel to meet appropriate professional requirements in the State.

(d)(1) In meeting the requirements in paragraphs (b) and (c) of this section, a determination must be made about the status of personnel standards in the State. That determination must be based on current information that accurately describes, for each profession or discipline in which personnel are providing special education or related services, whether the applicable standards are consistent with the highest requirements in the State for that profession or discipline.

(2) The information required in paragraph (d)(1) of this section must be on file in the SEA, and available to the public.

(e) In identifying the highest requirements in the State for purposes of this section, the requirements of all State statutes and the rules of all State agencies applicable to serving children and youth with disabilities must be considered.

(Authority: 20 U.S.C. 1413(a)(14))

Note: The regulations require that the State use its own existing highest requirements to determine the standards appropriate to personnel who provide special education and related services under this part. The regulations do not require States to set any specified training standard, such as a master's degree, for employment of personnel who provide services under this part. In some instances, States will be required to show that they are taking steps to retrain or to hire personnel to meet the standards adopted by the SEA that are based on requirements for practice in a specific profession or discipline that were established by other State agencies. States in this position need not, however, require personnel providing services under this part to apply for and obtain the license, registration, or other comparable credential required by other agencies of individuals in that profession or discipline. The regulations permit each State to determine the specific occupational categories required to provide special education and related services and to revise or expand these categories as needed. The professions or disciplines defined by the State need not be limited to traditional occupational categories.

§300.154 Transition of individuals from Part H to Part B.

Each State plan must set forth policies and procedures relating to the smooth transition for those individuals participating in the early intervention program under Part H of the Act who will participate in preschool programs assisted under this part, including a method of ensuring that when a child turns age 3 an IEP, or, if consistent with sections 614(a)(5) and 677(d) of the Act, an individualized family service plan, has been developed and implemented by the child's third birthday.

(Authority: 20 U.S.C. 1413(a)(15))

©1993, EDLAW, Inc.

AL EDUCATIONAL AGENCY APPLICATIONS — GENERAL

0.180 Submission of application.

in order to receive payments under Part B of the Act for any fiscal year, an LEA must submit an application to the SEA.

(Authority: 20 U.S.C. 1414(a))

§300.181 [Reserved]

§300.182 The excess cost requirement.

An LEA may only use funds under Part B of the Act for the excess costs of providing special education and related services for children with disabilities.

(Authority: 20 U.S.C. 1414(a)(1), (a)(2)(B)(i))

§300.183 Meeting the excess cost requirement.

(a) An LEA meets the excess cost requirement if it has on the average spent at least the amount determined under §300.184 for the education of each of its children with disabilities. This amount may not include capital outlay or debt service.

(Authority: 20 U.S.C. 1402(20); 1414(a)(1))

Note: The excess cost requirement means that the LEA must spend a certain minimum amount for the education of its children with disabilities before Part B funds are used. This ensures that children served with Part B funds have at least the same average amount spent on them, from sources other than Part B, as do the children in the school district taken as a whole.

The minimum amount that must be spent for the education of children with disabilities is computed under a statutory formula. Section 300.184 implements this formula and gives a step-by-step method to determine the minimum amount. Excess costs are those costs of special education and related services that exceed the minimum amount. Therefore, if an LEA can show that it has (on the average) spent the minimum amount for the education of each of its children with disabilities, it has met the excess cost requirement, and all additional costs are excess costs. Part B funds can then be used to pay for these additional costs, subject to the other requirements of Part B (priorities, etc.). In the Note under §300.184, there is an example of how the minimum amount is computed.

§300.184 Excess costs — computation of minimum amount.

The minimum average amount that an LEA must spend under §300.183 for the education of each of its children with disabilities is computed as follows:

(a) Add all expenditures of the LEA in the preceding school year, except capital outlay and debt service —

(1) For elementary school students, if the child with a disability is an elementary school student; or

(2) For secondary school students, if the child with a disability is a secondary school student.

(b) From this amount, subtract the total of the following amounts spent for elementary school students or for secondary school students, as the case may be —

(1) Amounts the agency spent in the preceding school year from funds awarded under Part B of the Act and Titles I and VII of the Elementary and Secondary Education Act of 1965; and (2) Amounts from State and local funds that the agency spent in the preceding school year for —

(i) Programs for children with disabilities;

(ii) Programs to meet the special educational needs of educationally deprived children; and

(iii) Programs of bilingual education for limited English proficient children.

(c) Divide the result under paragraph (b) of this section by the average number of students enrolled in the agency in the preceding school year —

(1) In its elementary schools, if the child with a disability is an elementary school student; or (2) In its secondary schools, if the child with a disability is a secondary school student.

(Authority: 20 U.S.C. 1414(a)(1))

Note: The following is an example of how an LEA might compute the average minimum amount it must spend for the education of each of its children with disabilities, under §300.183. This example follows the formula in §300.184. Under the statute and regulations, the LEA must make one computation for children with disabilities in its elementary schools and a separate computation for children with disabilities in its secondary schools. The computation for elementary school students with disabilities would be done as follows:

a. First, the LEA must determine its total amount of expenditures for elementary school students from all sources — local, State, and Federal (including Part B) — in the preceding school year. Only capital outlay and debt service are excluded.

Example: An LEA spent the following amounts last year for elementary school students (including its elementary school students with disabilities):

(1) From local tax funds	$2,750,000.
(2) From State funds	7,000,000.
(3) From Federal funds	750,000.
	10,500,000.

Of this total, $500,000 was for capital outlay and debt service relating to the education of elementary school students. This must be subtracted from total expenditures:

$$
\begin{array}{r} \$10{,}500{,}000. \\ -\ \underline{500{,}000.} \end{array}
$$

Total expenditures for elementary school students (less capital outlay and debt service) =

$ 10,000,000.

b. Next, the LEA must subtract amounts spent for:

(1) Programs for children with disabilities;

(2) Programs to meet the special educational needs of educationally deprived children; and

(3) Programs of bilingual education for limited English proficient children.

These are funds that the LEA actually spent, not funds received last year but carried over for the current school year.

Example: The LEA spent the following amounts for elementary school students last year:

(1) From funds under Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965	300,000.
(2) From a special State program for educationally deprived children	200,000.
(3) From a grant under Part B	200,000.
(4) From State funds for the education of children with disabilities	500,000.
(5) From a locally-funded program for children with disabilities	250,000.
(6) From a grant for a bilingual education program under Title VII of the Elementary and Secondary Education Act of 1965	150,000.
Total	$ 1,600,000.

(An LEA would also include any other funds it spent from Federal, State, or local sources for the three basic purposes: Children with disabilities, educationally deprived children, and bilingual education for limited English proficient children.)

This amount is subtracted from the LEA's total expenditure for elementary school students computed above:

$$
\begin{array}{r} \$10{,}000{,}000. \\ \underline{-1{,}600{,}000.} \\ \$\ 8{,}400{,}000. \end{array}
$$

©1993, EDLAW, Inc.

c. The LEA next must divide by the average number of students enrolled in the elementary schools of the agency last year (including its students with disabilities).

Example: Last year, an average of 7,000 students were enrolled in the agency's elementary schools. This must be divided into the amount computed under the above paragraph:

$8,400,000/7,000 students = $1,200/student.

This figure is in the minimum amount the LEA must spend (on the average) for the education of each of its students with disabilities. Funds under Part B may be used only for costs over and above this minimum. In this example, if the LEA has 100 elementary school students with disabilities, it must keep records adequate to show that it has spent at least $120,000 for the education of those students (100 students times $1,200/student), not including capital outlay and debt service.

This $120,000 may come from any funds except funds under Part B, subject to any legal requirements that govern the use of those other funds.

If the LEA has secondary school students with disabilities, it must do the same computation for them. However the amounts used in the computation would be those the LEA spent last year for the education of secondary school students, rather than for elementary school students.

§300.185 Computation of excess costs — consolidated application.

The minimum average amount under §300.183, if two or more LEAs submit a consolidated application, is the average of the combined minimum average amounts determined under §300.184 in those agencies for elementary or secondary school students, as the case may be.

(Authority: 20 U.S.C. 1414(a)(1))

§300.186 Excess costs — limitation on use of Part B funds.

(a) The excess cost requirement prevents an LEA from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a child with a disability, subject to paragraph (b) of this section.

(b) The excess cost requirement does not prevent an LEA from using Part B funds to pay for all of the costs directly attributable to the education of a child with a disability in any of the age ranges three, four, five, eighteen, nineteen, twenty, or twenty-one, if no local or State funds are available for nondisabled children in that age range. However, the LEA must comply with the nonsupplanting and other requirements of this part in providing the education and services.

(Authority: 20 U.S.C. 1402(20); 1414(a)(1))

§300.190 Consolidated applications.

(a) [Reserved]

(b) Required applications. An SEA may require LEAs to submit a consolidated application for payments under Part B of the Act if the SEA determines that an individual application submitted by an LEA will be disapproved because —

(1) The agency's entitlement is less than the $7,500 minimum required by section 611(c)(4)(A)(i) of the Act (§300.360(a)(1)); or

(2) The agency is unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of children with disabilities.

(c) Size and scope of program. The SEA shall establish standards and procedures for determinations under paragraph (b)(2) of this section.

(Authority: 20 U.S.C. 1414(c)(1))

§300.191 [Reserved]

§300.192 State regulation of consolidated applications.

(a) The SEA shall issue regulations with respect to consolidated applications submitted under this part.

(b) The SEA's regulations must —

(1) Be consistent with sections 612(1)-(7) and 613(a) of the Act; and

(2) Provide participating LEAs with joint responsibilities for implementing programs receiving payments under this part.

(Authority: 20 U.S.C. 1414(c)(2)(B))

(c) If an IEU is required by State law to carry out this part, the joint responsibilities given to LEAs under paragraph (b)(2) of this section do not apply to the administration and disbursement of any payments received by the IEU. Those administrative responsibilities must be carried out exclusively by the IEU.

(Authority: 20 U.S.C. 1414(c)(2)(C))

§300.193 State educational agency approval; disapproval.

(a)-(b) [Reserved]

(c) In carrying out its functions under this section, each SEA shall consider any decision resulting from a hearing under §§300.506-300.513 that is adverse to the LEA involved in the decision.

(Authority: 20 U.S.C. 1414(b)(3))

§300.194 Withholding.

(a) If an SEA, after giving reasonable notice and an opportunity for a hearing to an LEA, decides that the LEA in the administration of an application approved by the SEA has failed to comply with any requirement in the application, the SEA, after giving notice to the LEA, shall —

(1) Make no further payments to the LEA until the SEA is satisfied that there is no longer any failure to comply with the requirement; or

(2) Consider its decision in its review of any application made by the LEA under §300.180; or

(3) Both.

(b) [Reserved]

(Authority: 20 U.S.C. 1414(b)(2))

LOCAL EDUCATIONAL AGENCY APPLICATIONS — CONTENTS

§300.220 Child identification.

Each application must include procedures that ensure that all children residing within the jurisdiction of the LEA who have disabilities, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated, including a practical method for determining which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(Authority: 20 U.S.C. 1414(a)(1)(A))

Note: The LEA is responsible for ensuring that all children with disabilities within its jurisdiction are identified, located, and evaluated, including children in all public and private agencies and institutions within that jurisdiction. Collection and use of data are subject to the confidentiality requirements of §§300.560-300.576.

§300.221 Confidentiality of personally identifiable information.

Each application must include policies and procedures that ensure that the criteria in §§300.560-300.574 are met.

(Authority: 20 U.S.C. 1414(a)(1)(B))

§300.222 Full educational opportunity goal — timetable.

Each application must —

(a) Include a goal of providing full educational opportunity to all children with disabilities, aged birth through 21; and

(b) Include a detailed timetable for accomplishing the goal.

(Authority: 20 U.S.C. 1414(a)(1)(C), (D))

©1993, EDLAW,Inc.

§300.223 Facilities, personnel, and services.

Each application must provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal in §300.222.

(Authority: 20 U.S.C. 1414(a)(1)(E))

§300.224 Personnel development.

Each application must include procedures for the implementation and use of the comprehensive system of personnel development established by the SEA under §300.139.

(Authority: 20 U.S.C. 1414(a)(1)(C)(i))

§300.225 Priorities.

Each application must include priorities that meet the requirements of §§300.320-300.324.

(Authority: 20 U.S.C. 1414(a)(1)(C)(ii))

§300.226 Parent involvement.

Each application must include procedures to ensure that, in meeting the goal under §300.222, the LEA makes provision for participation of and consultation with parents or guardians of children with disabilities.

(Authority: 20 U.S.C. 1414(a)(1)(C)(iii))

§300.227 Participation in regular education programs.

(a) Each application must include procedures to ensure that to the maximum extent practicable, and consistent with §§300.550-300.553, the LEA provides special services to enable children with disabilities to participate in regular educational programs. (b) Each application must describe –

(1) The types of alternative placements that are available for children with disabilities; and

(2) The number of children with disabilities within each disability category who are served in each type of placement.

(Authority: 20 U.S.C. 1414(a)(1)(C)(iv))

§300.228 [Reserved]

§300.229 Excess cost.

Each application must provide assurance satisfactory to the SEA that the LEA uses funds provided under Part B of the Act only for costs that exceed the amount computed under §300.184 and that are directly attributable to the education of children with disabilities.

(Authority: 20 U.S.C. 1414(a)(2)(B))

§300.230 Nonsupplanting.

(a) Each application must provide assurance satisfactory to the SEA that the LEA uses funds provided under Part B of the Act to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of children with disabilities, and in no case to supplant those State and local funds.

(b) To meet the requirement in paragraph (a) of this section, the total amount or average per capita amount of State and local school funds budgeted by the LEA for expenditures in the current fiscal year for the education of children with disabilities must be at least equal to the total amount or average per capita amount of State and local school funds actually expended for the education of children with disabilities in the most recent preceding fiscal year for which the information is available. Allowance may be made for –

(1) Decreases in enrollment of children with disabilities; and

(2) Unusually large amounts of funds expended for such long-term purposes as the acquisition of equipment and the construction of school facilities.

(Authority: 20 U.S.C. 1414(a)(2)(B))

§300.231 Comparable services.

(a) Each application must provide assurance satisfactory to the SEA that the LEA meets the requirements of this section.

(b) An LEA may not use funds under Part B of the Act to provide services to children with disabilities unless the LEA uses State and local funds to provide services to those children that, taken as a whole, are at least comparable to services provided to other children with disabilities in that LEA.

(c) Each LEA shall maintain records that show that the LEA meets the requirement in paragraph (b) of this section.

(Authority: 20 U.S.C. 1414(a)(2)(C))

Note: Under the comparability" requirement, if State and local funds are used to provide certain services, those services must be provided with State and local funds to all children with disabilities in the LEA who need them. Part B funds may then be used to supplement existing services, or to provide additional services to meet special needs. This, of course, is subject to the other requirements of the Act, including the priorities under §§300.320-300.324.

§§300.232-300.234 [Reserved]

§300.235 Individualized education programs.

Each application must include procedures to assure that the LEA complies with §§300.340-300.350.

(Authority: 20 U.S.C. 1414(a)(5))

§300.236 [Reserved]

§300.237 Procedural safeguards.

Each application must provide assurance satisfactory to the SEA that the LEA has procedural safeguards that meet the requirements of §§300.500-300.515.

(Authority: 20 U.S.C. 1414(a)(7))

§300.238 Use of Part B funds.

Each application must describe how the LEA will use the funds under Part B of the Act during the next school year.

(Authority: 20 U.S.C. 1414(a))

§300.239 [Reserved]

§300.240 Other requirements.

Each local application must include additional procedures and information that the SEA may require in order to meet the State plan requirements of §§300.121-300.153.

(Authority: 20 U.S.C. 1414(a)(6))

APPLICATION FROM SECRETARY OF THE INTERIOR

§300.260 Submission of application; approval.

(a) In order to receive a grant under this part, the Secretary of the Interior shall submit an application that –

(1) Meets the requirements of section 612(1), 612(2)(C)- (E), 612(4), 612(5), 612(6), and 612(7) of the Act (including monitoring and evaluation activities);

(2) Meets the requirements of section 613(a), (2), (3), (4)(B), (5), (6), (7), (10), (11), (12), (13), (14), and (15), 613(b), and 613(e) of the Act;

(3) Meets the requirements of section 614(a)(1)(A)-(B), (2)(A), (C), (3),(4), (5), and (7) of the Act;

(4) Meets the requirements of this part that implement the sections of the Act listed in paragraphs (a)(1)-(3) of this section.

(5) Includes a description of how the Secretary of the Interior will coordinate the provision of services under this part with LEAs, tribes and tribal organizations, and other private and Federal service providers;

(6) Includes an assurance that there are public hearings, adequate notice of such hearings, and an opportunity for comment afforded to

©1993, EDLAW,Inc.

members of tribes, tribal governing bodies, and affected local school boards before the adoption of the policies, programs, and procedures required under paragraphs (a)(1)-(3) of this section;

(7) Includes an assurance that the Secretary of the Interior will provide such information as the Secretary may require to comply with section 618(b)(1) of the Act, including data on the number of children and youth with disabilities served and the types and amounts of services provided and needed;

(8) Includes an assurance that, by October 1, 1992, the Secretaries of the Interior and Health and Human Services will enter into a memorandum of agreement, to be provided to the Secretary, for the coordination of services, resources, and personnel between their respective Federal, State, and local offices and with SEAs and LEAs and other entities to facilitate the provision of services to Indian children with disabilities residing on or near reservations. That agreement must provide for the apportionment of responsibilities and costs, including, but not limited to, those related to child find, evaluation, diagnosis, remediation or therapeutic measures, and (where appropriate) equipment and medical or personal supplies, or both, as needed for a child to remain in school or a program; and

(9) Includes an assurance that the Department of the Interior will cooperate with the Department of Education in the latter's exercise of monitoring and oversight of this application, and any agreements entered into between the Secretary of the Interior and other entities under the Act and will fulfill its duties under the Act.

(b) Sections 300.581-300.585 apply to grants available to the Secretary of the Interior under this part.

(Authority: 20 U.S.C. 1411(f))

§300.261 Public participation.

In the development of the application for the Department of the Interior, the Secretary of the Interior shall provide for public participation consistent with §§300.280-300.284.

(Authority: 20 U.S.C. 1411(f))

§300.262 Use of Part B funds.

(a)(1) The Department of the Interior may use five percent of its payment under §300.709 in any fiscal year, or $350,000, whichever is greater, for administrative costs in carrying out the provisions of this part.

(2) The remainder of the payments to the Secretary of the Interior under §300.709 in any fiscal year must be used in accordance with the priorities under §§300.320-300.324.

(b) Payments to the Secretary of the Interior under §300.710 must be used in accordance with that section.

(Authority: 20 U.S.C. 1411(f))

§300.263 Applicable regulations.

The Secretary of the Interior shall comply with the requirements of §§300.301-300.303, §§300.305-300.307, and §§300.340-300.347, §300.350, §§300.360-300.383, §§300.400-300.402, §§300.500-300.585, §§300.600-300.621, and §§300.660-300.662.

(Authority: 20 U.S.C. 1411(f)(2))

PUBLIC PARTICIPATION

§300.280 Public hearings before adopting a State plan.

(a) Prior to its adoption of a State plan, the SEA shall –

(1) Make the plan available to the general public;

(2) Hold public hearings; and

(3) Provide an opportunity for comment by the general public on the plan.

(Authority: 20 U.S.C. 1412(7))

§300.281 Notice.

(a) The SEA shall provide notice to the general public of the public hearings.

(b) The notice must be in sufficient detail to inform the general public about –

(1) The purpose and scope of the State plan and its relation to Part B of the Act;

(2) The availability of the State plan;

(3) The date, time, and location of each public hearing;

(4) The procedures for submitting written comments about the plan; and

(5) The timetable for developing the final plan and submitting it to the Secretary for approval.

(c) The notice must be published or announced –

(1) In newspapers or other media, or both, with circulation adequate to notify the general public about the hearings; and

(2) Enough in advance of the date of the hearings to afford interested parties throughout the State a reasonable opportunity to participate.

(Authority: 20 U.S.C. 1412(7))

§300.282 Opportunity to participate; comment period.

(a) The SEA shall conduct the public hearings at times and places that afford interested parties throughout the State a reasonable opportunity to participate.

(b) The plan must be available for comment for a period of at least 30 days following the date of the notice under §300.281. (Authority: 20 U.S.C. 1412(7))

§300.283 Review of public comments before adopting plan.

Before adopting its State plan, the SEA shall –

(a) Review and consider all public comments; and

(b) Make any necessary modifications in the plan.

(Authority: 20 U.S.C. 1412(7))

§300.284 Publication and availability of approved plan.

After the Secretary approves a State plan, the SEA shall give notice in newspapers or other media, or both, that the plan is approved. The notice must name places throughout the State where the plan is available for access by any interested person. (Authority: 20 U.S.C. 1412(7))

Subpart C – Services

FREE APPROPRIATE PUBLIC EDUCATION

§300.300 Timelines for free appropriate public education.

(a) General. Each State shall ensure that FAPE is available to all children with disabilities aged 3 through 18 within the State not later than September 1, 1978, and to all children with disabilities aged 3 through 21 within the State not later than September 1, 1980.

(b) Age ranges 3-5 and 18-21. This paragraph provides rules for applying the requirement in paragraph (a) of this section to children with disabilities aged 3, 4, 5, 18, 19, 20, and 21:

(1) If State law or a court order requires the State to provide education for children with disabilities in any disability category in any of these age groups, the State must make FAPE available to all children with disabilities of the same age who have that disability.

(2) If a public agency provides education to nondisabled children in any of these age groups, it must make FAPE available to at least a proportionate number of children with disabilities of the same age.

(3) If a public agency provides education to 50 percent or more of its children with disabilities in any disability category in any of these age groups, it must make FAPE available to all its children with disabilities of the same age who have that

©1993, EDLAW,Inc.

disability. This provision does not apply to children aged 3 through 5 for any fiscal year for which the State receives a grant under section 619(a)(1) of the Act.

(4) If a public agency provides education to a child with a disability in any of these age groups, it must make FAPE available to that child and provide that child and his or her parents all of the rights under Part B of the Act and this part. (5) A State is not required to make FAPE available to a child with a disability in one of these age groups if –

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to nondisabled children in that age group; or

(ii) The requirement is inconsistent with a court order that governs the provision of free public education to children with disabilities in that State.

(c) Children aged 3 through 21 on reservations. With the exception of children identified in §300.709(a)(1) and (2), the SEA shall be responsible for ensuring that all of the requirements of Part B of the Act are implemented for all children aged 3 through 21 on reservations.

(Authority: 20 U.S.C. 1411(f); 1412(2)(B); S. Rep. No. 94-168, p. 19 (1975))

Note 1: The requirement to make FAPE available applies to all children with disabilities within the State who are in the age ranges required under §300.300 and who need special education and related services. This includes children with disabilities already in school and children with less severe disabilities, who are not covered under the priorities under §300.321.

Note 2: In order to be in compliance with §300.300, each State must ensure that the requirement to identify, locate, and evaluate all children with disabilities is fully implemented by public agencies throughout the State. This means that before September 1, 1978, every child who has been referred or is on a waiting list for evaluation (including children in school as well as those not receiving an education) must be evaluated in accordance with §§300.530-300.533. If, as a result of the evaluation, it is determined that a child needs special education and related services, an IEP must be developed for the child by September 1, 1978, and all other applicable requirements of this part must be met.

Note 3: The requirement to identify, locate, and evaluate children with disabilities (commonly referred to as the child find system") was enacted on August 21, 1974, under Pub. L. 93-380. While each State needed time to establish and implement its child find system, the four year period between August 21, 1974, and September 1, 1978, is considered to be sufficient to ensure that the system is fully operational and effective on a State-wide basis.

Under the statute, the age range for the child find requirement (0-21) is greater than the mandated age range for providing FAPE. One reason for the broader age requirement under child find" is to enable States to be aware of and plan for younger children who will require special education and related services. It also ties in with the full educational opportunity goal requirement that has the same age range as child find. Moreover, while a State is not required to provide FAPE to children with disabilities below the age ranges mandated under §300.300, the State may, at its discretion, extend services to those children, subject to the priority requirements of §§300.320-300.324.

§300.301 Free appropriate public education – methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, when it is necessary to place a child with a disability in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a child with a disability.

(Authority: 20 U.S.C. 1401 (18); 1412(2)(B))

§300.302 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(Authority: 20 U.S.C. 1412(2)(B); 1413(a)(4)(B))

Note: This requirement applies to placements that are made by public agencies for educational purposes, and includes placements in State-operated schools for children with disabilities, such as a State school for students with deafness or students with blindness.

§300.303 Proper functioning of hearing aids.

Each public agency shall ensure that the hearing aids worn by children with hearing impairments including deafness in school are functioning properly.

(Authority: 20 U.S.C. 1412(2)(B))

Note: The report of the House of Representatives on the 1978 appropriation bill includes the following statement regarding hearing aids:

> In its report on the 1976 appropriation bill the Committee expressed concern about the condition of hearing aids worn by children in public schools. A study done at the Committee's direction by the Bureau of Education for the Handicapped reveals that up to one-third of the hearing aids are malfunctioning. Obviously, the Committee expects the Office of Education will ensure that hearing impaired school children are receiving adequate professional assessment, follow-up and services.

(Authority: H. R. Rep. No. 95-381, p. 67 (1977))

§300.304 Full educational opportunity goal.

(a) Each SEA shall ensure that each public agency establishes and implements a goal of providing full educational opportunity to all children with disabilities in the area served by the public agency.

(b) Subject to the priority requirements of §§300.320- 300.324, an SEA or LEA may use Part B funds to provide facilities, personnel, and services necessary to meet the full educational opportunity goal.

(Authority: 20 U.S.C. 1412(2)(A); 1414(a)(1)(C))

Note: In meeting the full educational opportunity goal, the Congress also encouraged LEAs to include artistic and cultural activities in programs supported under this part, subject to the priority requirements of §§300.320-300.324. This point is addressed in the following statements from the Senate Report on Pub. L. 94-142:

> The use of the arts as a teaching tool for the handicapped has long been recognized as a viable, effective way not only of teaching special skills, but also of reaching youngsters who had otherwise been unteachable. The Committee envisions that programs under this bill could well include an arts component and, indeed, urges that local educational agencies include the arts in programs for the handicapped funded under this Act. Such a program could cover both appreciation of the arts by the handicapped youngsters, and the utilization of the arts as a teaching tool per se.
>
> Museum settings have often been another effective tool in the teaching of handicapped children. For example, the Brooklyn Museum has been a leader in developing exhibits utilizing the heightened tactile sensory skill of the blind. Therefore, in light of the national policy concerning the use of museums in federally supported education programs enunciated in the Education Amendments of 1974, the Committee also urges local educational agencies to include museums in programs for the handicapped funded under this Act.

(Authority: S. Rep. No. 94-168, p. 13 (1975))

§300.305 Program options.

Each public agency shall take steps to ensure that its children with disabilities have available to them the variety of educational programs and services available to nondisabled children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(Authority: 20 U.S.C. 1412(2)(A); 1414(a)(1)(C))

©1993, EDLAW, Inc.

Note: The above list of program options is not exhaustive, and could include any program or activity in which nondisabled students participate.

§300.306 Nonacademic services.

(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(Authority: 20 U.S.C. 1412(2)(A); 1414(a)(1)(C))

§300.307 Physical education.

(a) General. Physical education services, specially designed if necessary, must be made available to every child with a disability receiving FAPE.

(b) Regular physical education. Each child with a disability must be afforded the opportunity to participate in the regular physical education program available to nondisabled children unless —

(1) The child is enrolled full time in a separate facility; or

(2) The child needs specially designed physical education, as prescribed in the child's IEP.

(c) Special physical education. If specially designed physical education is prescribed in a child's IEP, the public agency responsible for the education of that child shall provide the services directly, or make arrangements for those services to be provided through other public or private programs.

(d) Education in separate facilities. The public agency responsible for the education of a child with a disability who is enrolled in a separate facility shall ensure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section.

(Authority: 20 U.S.C. 1401(a)(16); 1412(5)(B); 1414(a)(6))

Note: The Report of the House of Representatives on Pub. L. 94-142 includes the following statement regarding physical education:

> Special education as set forth in the Committee bill includes instruction in physical education, which is provided as a matter of course to all non-handicapped children enrolled in public elementary and secondary schools. The Committee is concerned that although these services are available to and required of all children in our school systems, they are often viewed as a luxury for handicapped children.
>
> *****
>
> The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education services are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the Committee expects such services, specially designed where necessary, to be provided as an integral part of the educational program of every handicapped child.

(Authority: H. R. Rep. No. 94-332, p. 9 (1975))

§300.308 Assistive technology.

Each public agency shall ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in §§300.5-300.6, are made available to a child with a disability if required as a part of the child's —

(a) Special education under §300.17;

(b) Related services under §300.16; or

(c) Supplementary aids and services under §300.550(b)(2).

(Authority: 20 U.S.C. 1412(2), (5)(B))

PRIORITIES IN THE USE OF PART B FUNDS

§300.320 Definitions of first priority children and second priority children.

For the purposes of §§300.321-300.324, the term:

(a) "First priority children" means children with disabilities who —

(1) Are in an age group for which the State must make FAPE available under §300.300; and

(2) Are not receiving any education.

(b) "Second priority children" means children with disabilities, within each disability category, with the most severe disabilities who are receiving an inadequate education.

(Authority: 20 U.S.C. 1412(3))

Note 1: After September 1, 1978, there should be no second priority children, since States must ensure, as a condition of receiving Part B funds for fiscal year 1979, that all children with disabilities will have FAPE available by that date.

Note 2: The term "free appropriate public education," as defined in §300.8, means special education and related services that *** "are provided in conformity with an IEP" ***.

New first priority children will continue to be found by the State after September 1, 1978 through on-going efforts to identify, locate, and evaluate all children with disabilities.

§300.321 Priorities.

(a) Each SEA and LEA shall use funds provided under Part B of the Act in the following order of priorities:

(1) To provide FAPE to first priority children, including the identification, location, and evaluation of first priority children.

(2) To provide FAPE to second priority children, including the identification, location, and evaluation of second priority children.

(3) To meet the other requirements of this part.

(b) The requirements of paragraph (a) of this section do not apply to funds that the State uses for administration under §300.620.

(Authority: 20 U.S.C. 1411(b)(1)(B), (b)(2)(B), (c)(1)(B), (c)(2)(A)(ii))

Note: SEAs as well as LEAs must use Part B funds (except the portion used for State administration) for the priorities. A State may have to set aside a portion of its Part B allotment to be able to serve newly identified first priority children.

After September 1, 1978, Part B funds may be used —

(1) To continue supporting child identification, location, and evaluation activities;

(2) To provide FAPE to newly identified first priority children;

(3) To meet the full educational opportunity goal required under §300.304, including employing additional personnel and providing in-service training, in order to increase the level, intensity and quality of services provided to individual children with disabilities; and

(4) To meet the other requirements of Part B.

§300.322 [Reserved]

§300.323 Services to other children.

If a State or an LEA is providing FAPE to all of its first priority children, that State or LEA may use funds provided under Part B of the Act —

(a) To provide FAPE to children with disabilities who are not receiving any education and who are in the age groups not covered under §300.300 in that State; or

(b) To provide FAPE to second priority children; or

(c) Both.

(Authority: 20 U.S.C. 1411(b)(1)(B), (b)(2)(B), (c)(2)(A)(ii))

©1993, EDLAW,Inc.

§300.324 Application of local educational agency to use funds for the second priority.

An LEA may use funds provided under Part B of the Act for second priority children, if it provides assurance satisfactory to the SEA in its application (or an amendment to its application) –

(a) That all first priority children have FAPE available to them;

(b) That the LEA has a system for the identification, location, and evaluation of children with disabilities, as described in its application; and

(c) That whenever a first priority child is identified, located, and evaluated, the LEA makes FAPE available to the child.

(Authority: 20 U.S.C. 1411(b)(1)(B), (c)(1)(B); 1414(a)(1)(C)(ii))

INDIVIDUALIZED EDUCATION PROGRAMS

§300.340 Definitions.

(a) As used in this part, the term "individualized education program" means a written statement for a child with a disability that is developed and implemented in accordance with §§300.341-300.350.

(b) As used in §§300.346 and 300.347, "participating agency" means a State or local agency, other than the public agency responsible for a student's education, that is financially and legally responsible for providing transition services to the student.

(Authority: 20 U.S.C. 1401(a)(20))

§300.341 State educational agency responsibility.

(a) Public agencies. The SEA shall ensure that each public agency develops and implements an IEP for each of its children with disabilities.

(b) Private schools and facilities. The SEA shall ensure that an IEP is developed and implemented for each child with a disability who –

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a parochial school or other private school and receives special education or related services from a public agency.

(Authority: 20 U.S.C. 1412(4), (6); 1413(a)(4))

Note: This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare) that provide special education to a child with a disability either directly, by contract or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a child with a disability, that agency would be responsible for ensuring that an IEP is developed for the child.

§300.342 When individualized education programs must be in effect.

(a) At the beginning of each school year, each public agency shall have in effect an IEP for every child with a disability who is receiving special education from that agency.

(b) An IEP must –

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under §300.343.

(Authority: 20 U.S.C. 1412(2)(B), (4), (6); 1414(a)(5); Pub. L. 94-142, sec. 8(c) (1975))

Note: Under paragraph (b)(2), it is expected that the IEP of a child with a disability will be implemented immediately following the meetings under §300.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances that require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

§300.343 Meetings.

(a) General. Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability (or, if consistent with State policy and at the discretion of the LEA, and with the concurrence of the parents, an individualized family service plan described in section 677(d) of the Act for each child with a disability, aged 3 through 5).

(b) [Reserved]

(c) Timeline. A meeting to develop an IEP for a child must be held within 30 calendar days of a determination that the child needs special education and related services.

(d) Review. Each public agency shall initiate and conduct meetings to review each child's IEP periodically and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year.

(Authority: 20 U.S.C. 1412(2)(B), (4), (6); 1414(a)(5))

Note: The date on which agencies must have IEPs in effect is specified in §300.342 (the beginning of each school year). However, except for new children with disabilities (i.e., those evaluated and determined to need special education and related services for the first time), the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency. In order to have IEPs in effect at the beginning of the school year, agencies could hold meetings either at the end of the preceding school year or during the summer prior to the next school year. Meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review and, if appropriate, revise each child's IEP. The timing of those meetings could be on the anniversary date of the child's last IEP meeting, but this is left to the discretion of the agency.

§300.344 Participants in meetings.

(a) General. The public agency shall ensure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to §300.345.

(4) The child, if appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) Evaluation personnel. For a child with a disability who has been evaluated for the first time, the public agency shall ensure –

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(c) Transition services participants. (1) If a purpose of the meeting is the consideration of transition services for a student, the public agency shall invite –

(i) The student; and

(ii) A representative of any other agency that is likely to be responsible for providing or paying for transition services.

(2) If the student does not attend, the public agency shall take other steps to ensure that the student's preferences and interests are considered; and

(3) If an agency invited to send a representative to a meeting does not do so, the public agency shall take other steps to obtain the participation of the other agency in the planning of any transition services.

(Authority: 20 U.S.C. 1401(a)(19), (a)(20); 1412(2)(B), (4), (6); 1414(a)(5))

Note 1: In deciding which teacher will participate in meetings on a child's IEP, the agency may wish to consider the following possibilities:

(a) For a child with a disability who is receiving special education, the teacher could be the child's special education teacher. If the child's disability is a speech impairment, the teacher could be the speech-language pathologist.

(b) For a child with a disability who is being considered for placement in special education, the teacher could be the child's regular teacher, or

©1993, EDLAW, Inc.

a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

Either the teacher or the agency representative should be qualified in the area of the child's suspected disability.

For a child whose primary disability is a speech or language impairment, the evaluation personnel participating under paragraph (b)(1) of this section would normally be the speech-language pathologist.

Note 2: Under paragraph (c), the public agency is required to invite each student to participate in his or her IEP meeting, if a purpose of the meeting is the consideration of transition services for the student. For all students who are 16 years of age or older, one of the purposes of the annual meeting will always be the planning of transition services, since transition services are a required component of the IEP for these students.

For a student younger than age 16, if transition services are initially discussed at a meeting that does not include the student, the public agency is responsible for ensuring that, before a decision about transition services for the student is made, a subsequent IEP meeting is conducted for that purpose, and the student is invited to the meeting.

§300.345 Parent participation.

(a) Each public agency shall take steps to ensure that one or both of the parents of the child with a disability are present at each meeting or are afforded the opportunity to participate, including —

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b)(1) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting and who will be in attendance;

(2) If a purpose of the meeting is the consideration of transition services for a student, the notice must also —

(i) Indicate this purpose;

(ii) Indicate that the agency will invite the student; and

(iii) Identify any other agency that will be invited to send a representative.

(c) If neither parent can attend, the public agency shall use other methods to ensure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as —

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to ensure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the IEP.

(Authority: 20 U.S.C. 1401(a)(20); 1412 (2)(B), (4), (6); 1414(a)(5))

Note: The notice in paragraph (a) could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c), the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

§300.346 Content of individualized education program.

(a) General. The IEP for each child must include —

(1) A statement of the child's present levels of educational performance;

(2) A statement of annual goals, including short-term instructional objectives;

(3) A statement of the specific special education and related services to be provided to the child and the extent that the child will be able to participate in regular educational programs;

(4) The projected dates for initiation of services and the anticipated duration of the services; and

(5) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(b) Transition services. (1) The IEP for each student, beginning no later than age 16 (and at a younger age, if determined appropriate), must include a statement of the needed transition services as defined in §300.18, including, if appropriate, a statement of each public agency's and each participating agency's responsibilities or linkages, or both, before the student leaves the school setting.

(2) If the IEP team determines that services are not needed in one or more of the areas specified in §300.18(b)(2)(i) through (b)(2)(iii), the IEP must include a statement to that effect and the basis upon which the determination was made.

(Authority: 20 U.S.C. 1401(a)(19), (a)(20); 1412(2)(B), (4), (6); 1414(a)(5))

Note 1: The legislative history of the transition services provisions of the Act suggests that the statement of needed transition services referred to in paragraph (b) should include a commitment by any participating agency to meet any financial responsibility it may have in the provision of transition services. See House Report No. 101-544, p. 11 (1990).

Note 2: With respect to the provisions of paragraph (b), it is generally expected that the statement of needed transition services will include the areas listed in §300.18(b)(2)(i) through (b)(2)(iii). If the IEP team determines that services are not needed in one of those areas, the public agency must implement the requirements in paragraph (b)(2). Since it is a part of the IEP, the IEP team must reconsider its determination at least annually.

Note 3: Section 602(a)(20) of the Act provides that IEPs must include a statement of needed transition services for students beginning no later than age 16, but permits transition services to students below age 16 (i.e., "...and, when determined appropriate for the individual, beginning at age 14 or younger."). Although the statute does not mandate transition services for all students beginning at age 14 or younger, the provision of these services could have a significantly positive effect on the employment and independent living outcomes for many of these students in the future, especially for students who are likely to drop out before age 16. With respect to the provision of transition services to students below age 16, the Report of the House Committee on Education and Labor on Pub. L. 101-476 includes the following statement:

> Although this language leaves the final determination of when to initiate transition services for students under age 16 to the IEP process, it nevertheless makes clear that Congress expects consideration to be given to the need for transition services for some students by age 14 or younger. The Committee encourages that approach because of their concern that age 16 may be too late for many students, particularly those at risk of dropping out of school and those with the most severe disabilities. Even for those students who stay in school until age 18, many will need more than two years of transitional services. Students with disabilities are now dropping out of school before age 16, feeling that the education system has little to offer them. Initiating services at a younger age will be critical.
>
> (House Report No. 101-544, 10 (1990).)

§300.347 Agency responsibilities for transition services.

(a) If a participating agency fails to provide agreed-upon transition services contained in the IEP of a student with a disability, the public agency responsible for the student's education shall, as soon as possible, initiate a meeting for the purpose of identifying alternative strategies to meet the transition objectives and, if necessary, revising the student's IEP.

(b) Nothing in this part relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet the eligibility criteria of that agency.

(Authority: 20 U.S.C. 1401(a)(18), (a)(19), (a)(20); 1412(2)(B))

§300.348 Private school placements by public agencies.

(a) Developing individualized education programs. (1) Before a public agency places a child with a disability in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an IEP for the child in accordance with §300.343.

(2) The agency shall ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the agency shall use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.

(3) [Reserved]

(b) Reviewing and revising individualized education programs. (1) After a child with a disability enters a private school or facility, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall ensure that the parents and an agency representative;

(i) Are involved in any decision about the child's IEP; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) Responsibility. Even if a private school or facility implements a child's IEP, responsibility for compliance with this part remains with the public agency and the SEA.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§300.349 Children with disabilities in parochial or other private schools.

If a child with a disability is enrolled in a parochial or other private school and receives special education or related services from a public agency, the public agency shall –

(a) Initiate and conduct meetings to develop, review, and revise an IEP for the child, in accordance with §300.343; and

(b) Ensure that a representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to ensure participation by the private school, including individual or conference telephone calls.

(Authority: 20 U.S.C. 1413(a)(4)(A))

§300.350 Individualized education program – accountability.

Each public agency must provide special education and related services to a child with a disability in accordance with an IEP. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

(Authority: 20 U.S.C. 1412(2)(B); 1414(a)(5), (6); Cong. Rec. at H7152 (daily ed., July 21, 1975))

Note: This section is intended to relieve concerns that the IEP constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the goals and objectives listed in the IEP. Further, the section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made.

DIRECT SERVICE BY THE STATE EDUCATIONAL AGENCY

§300.360 Use of local educational agency allocation for direct services.

(a) An SEA may not distribute funds to an LEA, and shall use those funds to ensure the provision of FAPE to children with disabilities residing in the area served by the LEA, if the LEA, in any fiscal year –

(1) Is entitled to less than $7,500 for that fiscal year (beginning with fiscal year 1979);

(2) Does not submit an application that meets the requirements of §§300.220-300.240;

(3) Is unable or unwilling to establish and maintain programs of FAPE;

(4) Is unable or unwilling to be consolidated with other LEAs in order to establish and maintain those programs; or

(5) Has one or more children with disabilities who can best be served by a regional or State center designed to meet the needs of those children.

(b) In meeting the requirements in paragraph (a) of this section, the SEA may provide special education and related services directly, by contract, or through other arrangements.

(c) The excess cost requirements of §§300.182-300.186 do not apply to the SEA.

(Authority: 20 U.S.C. 1411(c)(4); 1413(b); 1414(d))

Note: Section 300.360 is a combination of three provisions in the statute (Sections 611(c)(4), 613(b), and 614(d)). This section focuses mainly on the State's administration and use of local entitlements under Part B.

The SEA, as a recipient of Part B funds, is responsible for ensuring that all public agencies in the State comply with the provisions of the Act, regardless of whether they receive Part B funds. If an LEA elects not to apply for its Part B entitlement, the State would be required to use those funds to ensure that FAPE is made available to children residing in the area served by that local agency. However, if the local entitlement is not sufficient for this purpose, additional State or local funds would have to be expended in order to ensure that FAPE and the other requirements of the Act are met.

Moreover, if the LEA is the recipient of any other Federal funds, it would have to be in compliance with 34 CFR §§104.31- 104.39 of the regulations implementing Section 504 of the Rehabilitation Act of 1973. It should be noted that the term "FAPE" has different meanings under Part B and Section 504. For example, under Part B, FAPE is a statutory term that requires special education and related services to be provided in accordance with an IEP. However, under Section 504, each recipient must provide an education that includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met ****" Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the FAPE requirement.

§300.361 Nature and location of services.

The SEA may provide special education and related services under §300.360(a) in the manner and at the location it considers appropriate. However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the LRE provisions of §§300.550-300.556).

(Authority: 20 U.S.C. 1414(d))

©1993, EDLAW,Inc.

§300.370 Use of State agency allocations.

(a) The State may use the portion of its allocation that it does not use for administration under §§300.620-300.621 –

(1) For support services and direct services in accordance with the priority requirements of §§300.320-300.324; and

(2) For the administrative costs of the State's monitoring activities and complaint investigations, to the extent that these costs exceed the administrative costs for monitoring and complaint investigations incurred during fiscal year 1985.

(b) For the purposes of paragraph (a) of this section –

(1) "Direct services" means services provided to a child with a disability by the State directly, by contract, or through other arrangements; and

(2) "Support services" includes implementing the comprehensive system of personnel development of §§300.380- 300.383, recruitment and training of hearing officers and surrogate parents, and public information and parent training activities relating to FAPE for children with disabilities.

(Authority: 20 U.S.C. 1411(b)(2), (c)(2))

§300.371 State matching.

Beginning with the period July 1, 1978-June 30, 1979, and for each following fiscal year, the funds that a State uses for direct and support services under §300.370 must be matched on a program basis by the State from funds other than Federal funds. This requirement does not apply to funds that the State uses under §300.360.

(Authority: 20 U.S.C. 1411(c)(2)(B), (c)(4)(B))

Note: The requirement in §300.371 would be satisfied if the State can document that the amount of State funds expended for each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

§300.372 Applicability of nonsupplanting requirement.

Beginning with funds appropriated for fiscal year 1979 and for each following fiscal year, the requirement in section 613(a)(9) of the Act, which prohibits supplanting with Federal funds, does not apply to funds that the State uses from its allocation under §300.706(a) for administration, direct services, or support services.

(Authority: 20 U.S.C. 1411(c)(3))

COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

§300.380 General.

Each State shall –

(a) Develop and implement a comprehensive system of personnel development that –

(1) Is consistent with the purposes of the Act and with the comprehensive system of personnel development described in 34 CFR §303.360;

(2) Meets the requirements in §§300.381-300.383; and

(3) Is consistent with the provisions on personnel standards in §300.153; and

(b) Include in its State plan a description of the personnel development system required in paragraph (a)(1) of this section.

(Authority: 20 U.S.C. 1413(a)(3), (a)(14))

§300.381 Adequate supply of qualified personnel.

Each State plan must include a description of the procedures and activities the State will undertake to ensure an adequate supply of qualified personnel (as the term "qualified" is defined at §300.15), including special education and related services personnel and leadership personnel, necessary to carry out the purposes of this part. The procedures and activities must include the development, updating, and implementation of a plan that –

(a) Addresses current and projected special education and related services personnel needs, including the need for leadership personnel; and

(b) Coordinates and facilitates efforts among SEA and LEAs, institutions of higher education, and professional associations to recruit, prepare, and retain qualified personnel, including personnel from minority backgrounds, and personnel with disabilities.

(Authority: 20 U.S.C. 1413(a)(3)(A))

§300.382 Personnel preparation and continuing education.

Each State plan must include a description of the procedures and activities the State will undertake to ensure that all personnel necessary to carry out this part are appropriately and adequately prepared. The procedures and activities must include –

(a) A system for the continuing education of regular and special education and related services personnel to enable these personnel to meet the needs of children with disabilities under this part;

(b) Procedures for acquiring and disseminating to teachers, administrators, and related services personnel significant knowledge derived from education research and other sources; and

(c) Procedures for adopting, if appropriate, promising practices, materials, and technology, proven effective through research and demonstration.

(Authority: 20 U.S.C. 1413(a)(3)(B))

§300.383 Data system on personnel and personnel development.

(a) General. The procedures and activities required in §§300.381 and 300.382 must include the development and maintenance of a system for determining, on an annual basis, the data required in paragraphs (b) and (c) of this section.

(b) Data on qualified personnel. (1) The system required by paragraph (a) of this section must enable each State to determine, on an annual basis –

(i) The number and type of personnel, including leadership personnel, employed in the provision of special education and related services, by profession or discipline;

(ii) The number and type of personnel who are employed with emergency, provisional, or temporary certification in each profession or discipline who do not hold appropriate State certification, licensure, or other credentials comparable to certification or licensure for that profession or discipline; and

(iii) The number and type of personnel, including leadership personnel, in each profession or discipline needed, and a projection of the numbers of those personnel that will be needed in five years, based on projections of individuals to be served, retirement and other departures of personnel from the field, and other relevant factors.

(2) The data on special education and related services personnel required in paragraph (b)(1) of this section must include audiologists, counselors, diagnostic and evaluation personnel, home-hospital teachers, interpreters for students with hearing impairments including deafness, occupational therapists, physical education teachers, physical therapists, psychologists, rehabilitation counselors, social workers, speech-language pathologists, teacher aides, recreation and therapeutic recreation specialists, vocational education teachers, work-study coordinators, and other instructional and noninstructional staff.

(3) The data on leadership personnel required by paragraph (b)(1) of this section must include administrators and supervisors of State or local agencies who are involved in the provision or supervision of services or activities necessary to carry out the purposes of this part.

(c) Data on personnel development. The system required in paragraph (a) of this section must enable each State to determine, on an annual basis, the institutions of higher education within the State that are

©1993, EDLAW,Inc.

preparing special education and related services personnel, including leadership personnel, by area of specialization, including –

(1) The numbers of students enrolled in programs for the preparation of special education and related services personnel administered by these institutions of higher education; and

(2) The numbers of students who graduated during the past year with certification or licensure, or with credentials to qualify for certification or licensure, from programs for the preparation of special education and related services personnel administered by institutions of higher education.

(Authority: 20 U.S.C. 1413(a)(3)(A))

§§300.384-300.387 [Reserved].

Subpart D – Private Schools

CHILDREN WITH DISABILITIES IN PRIVATE SCHOOLS PLACED OR REFERRED BY PUBLIC AGENCIES

§300.400 Applicability of §§300.401-300.402.

Sections 300.401-300.402 apply only to children with disabilities who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§300.401 Responsibility of State educational agency.

Each SEA shall ensure that a child with a disability who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services –

(1) In conformance with an IEP that meets the requirements of §§300.340-300.350;

(2) At no cost to the parents; and

(3) At a school or facility that meets the standards that apply to the SEA and LEAs (including the requirements of this part); and

(b) Has all of the rights of a child with a disability who is served by a public agency.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§300.402 Implementation by State educational agency.

In implementing §300.401, the SEA shall –

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a child with a disability; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards that apply to them.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§300.403 Placement of children by parents.

(a) If a child with a disability has FAPE available and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§300.450-300.452.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures of §§300.500-300.515.

(Authority: 20 U.S.C. 1412(2)(B); 1415)

CHILDREN WITH DISABILITIES ENROLLED BY THEIR PARENTS IN PRIVATE SCHOOLS

§300.450 Definition of "private school children with disabilities."

As used in this part, "private school children with disabilities" means children with disabilities enrolled by their parents in private schools or facilities other than children with disabilities covered under §§300.400-300.402.

(Authority: 20 U.S.C. 1413(a)(4)(A))

§300.451 State educational agency responsibility.

The SEA shall ensure that –

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school children with disabilities in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The requirements of 34 CFR §§76.651-76.662 are met.

(Authority: 20 U.S.C. 1413(a)(4)(A))

§300.452 Local educational agency responsibility.

Each LEA shall provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency.

(Authority: 20 U.S.C. 1413(a)(4)(A); 1414(a)(6))

PROCEDURES FOR BY-PASS

§300.480 By-pass – general.

(a) The Secretary implements a by-pass if an SEA is, and was on December 2, 1983, prohibited by law from providing for the participation of private school children with disabilities in the program assisted or carried out under this part, as required by section 613(a)(4)(A) of the Act and by §§300.451-300.452.

(b) The Secretary waives the requirement of section 613(a)(4)(A) of the Act and of §§300.451-300.452 if the Secretary implements a by-pass.

(Authority: 20 U.S.C. 1413(d)(1))

§300.481 Provisions for services under a by-pass.

(a) Before implementing a by-pass, the Secretary consults with appropriate public and private school officials, including SEA officials, in the affected State to consider matters such as –

(1) The prohibition imposed by State law that results in the need for a by-pass;

(2) The scope and nature of the services required by private school children with disabilities in the State, and the number of children to be served under the by-pass; and

(3) The establishment of policies and procedures to ensure that private school children with disabilities receive services consistent with the requirements of section 613(a)(4)(A) of the Act, §§300.451-300.452, and 34 CFR §§76.651-76.662.

(b) After determining that a by-pass is required, the Secretary arranges for the provision of services to private school children with disabilities in the State in a manner consistent with the requirements of section 613(a)(4)(A) of the Act and §§300.451-300.452 by providing services through one or more agreements with appropriate parties.

(c) For any fiscal year that a by-pass is implemented, the Secretary determines the maximum amount to be paid to the providers of services by multiplying –

(1) A per child amount that may not exceed the amount per child provided by the Secretary under this part for all children with disabilities in the State for the preceding fiscal year; by

(2) The number of private school children with disabilities (as defined by §§300.7(a) and 300.450) in the State, as determined by the Secretary on the basis of the most recent satisfactory data available, which may include an estimate of the number of those children with disabilities.

(d) The Secretary deducts from the State's allocation under this part the amount the Secretary determines is necessary to implement a by-pass and pays that amount to the provider of services. The Secretary may withhold this amount from the State's allocation pending final resolution of any investigation or complaint that could result in a determination that a by-pass must be implemented.

(Authority: 20 U.S.C. 1413(d)(2))

DUE PROCESS PROCEDURES

Source: Sections 300.482 through 300.486 appear at 49 FR 48526, Dec. 12, 1984, unless otherwise noted.

§300.482 Notice of intent to implement a by-pass.

(a) Before taking any final action to implement a by-pass, the Secretary provides the affected SEA with written notice.

(b) In the written notice, the Secretary –

(1) States the reasons for the proposed by-pass in sufficient detail to allow the SEA to respond; and

(2) Advises the SEA that it has a specific period of time (at least 45 days) from receipt of the written notice to submit written objections to the proposed by-pass and that it may request in writing the opportunity for a hearing to show cause why a by-pass should not be implemented.

(c) The Secretary sends the notice to the SEA by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1413(d)(3)(A))

§300.483 Request to show cause.

An SEA seeking an opportunity to show cause why a by-pass should not be implemented shall submit a written request for a show cause hearing to the Secretary.

(Authority: 20 U.S.C. 1413(d)(3)(A))

§300.484 Show cause hearing.

(a) If a show cause hearing is requested, the Secretary –

(1) Notifies the SEA and other appropriate public and private school officials of the time and place for the hearing; and

(2) Designates a person to conduct the show cause hearing. The designee must not have had any responsibility for the matter brought for a hearing.

(b) At the show cause hearing, the designee considers matters such as –

(1) The necessity for implementing a by-pass;

(2) Possible factual errors in the written notice of intent to implement a by-pass; and

(3) The objections raised by public and private school representatives.

(c) The designee may regulate the course of the proceedings and the conduct of parties during the pendency of the proceedings. The designee takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order.

(d) The designee may interpret applicable statutes and regulations, but may not waive them or rule on their validity.

(e) The designee arranges for the preparation, retention, and, if appropriate, dissemination of the record of the hearing.

(Authority: 20 U.S.C. 1413(d)(3)(A))

§300.485 Decision.

(a) The designee who conducts the show cause hearing –

(1) Issues a written decision that includes a statement of findings; and

(2) Submits a copy of the decision to the Secretary and sends a copy to each party by certified mail with return receipt requested.

(b) Each party may submit comments and recommendations on the designee's decision to the Secretary within 15 days of the date the party receives the designee's decision.

(c) The Secretary adopts, reverses, or modifies the designee's decision and notifies the SEA of the Secretary's final action. That notice is sent by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1413(d)(3)(A))

§300.486 Judicial review.

If dissatisfied with the Secretary's final action, the SEA may, within 60 days after notice of that action, file a petition for review with the United States court of appeals for the circuit in which the State is located. The procedures for judicial review are described in section 613(d)(3)(B)-(D) of the Act.

(Authority: 20 U.S.C. 1413(d)(3)(B)-(D))

Subpart E – Procedural Safeguards

DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN

§300.500 Definitions of "consent," "evaluation," and "personally identifiable."

As used in this part: "Consent" means that –

(a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

"Evaluation" means procedures used in accordance with §§300.530-300.534 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

"Personally identifiable" means that information includes –

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's social security number or student number; or

(d) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

(Authority: 20 U.S.C. 1415, 1417(c))

§300.501 General responsibility of public agencies.

Each SEA shall ensure that each public agency establishes and implements procedural safeguards that meet the requirements of §§300.500-300.515.

(Authority: 20 U.S.C. 1415(a))

§300.502 Opportunity to examine records.

The parents of a child with a disability shall be afforded, in accordance with the procedures of §§300.562-300.569, an opportunity to inspect and review all education records with respect to –

(a) The identification, evaluation, and educational placement of the child; and

(b) The provision of FAPE to the child.

(Authority: 20 U.S.C. 1415(b)(1)(A))

§300.503 Independent educational evaluation.

(a) General. (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part:

(i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

(ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with §300.301.

(b) Parent right to evaluation at public expense. A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under §300.506 to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) Parent initiated evaluations. If the parent obtains an independent educational evaluation at private expense, the results of the evaluation –

(1) Must be considered by the public agency in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) Requests for evaluations by hearing officers. If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) Agency criteria. Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

(Authority: 20 U.S.C. 1415(b)(1)(A))

§300.504 Prior notice; parent consent.

(a) Notice. Written notice that meets the requirements of §300.505 must be given to the parents of a child with a disability a reasonable time before the public agency –

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(b) Consent; procedures if a parent refuses consent.

(1) Parental consent must be obtained before –

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a child with a disability in a program providing special education and related services.

(2) If State law requires parental consent before a child with a disability is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(3) If there is no State law requiring consent before a child with a disability is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in §§300.506-300.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent. If it does so and the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§300.510-300.513.

(c) Additional State consent requirements. In addition to the parental consent requirements described in paragraph (b) of this section, a State may require parental consent for other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

(d) Limitation. A public agency may not require parental consent as a condition of any benefit to the parent or the child except for the service or activity for which consent is required under paragraphs (b) or (c) of this section.

(Authority: 20 U.S.C. 1415(b)(1)(C), (D); 1412(2), (6))

Note 1: Any changes in a child's special education program after the initial placement are not subject to the parental consent requirements in paragraph (b)(1), but are subject to the prior notice requirement in paragraph (a) and the IEP requirements of §§300.340-300.350.

Note 2: Paragraph (b)(2) means that if State law requires parental consent before evaluation or before special education and related services are initially provided, and the parent refuses (or otherwise withholds) consent, State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures of §§300.506-300.508 to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

Note 3: If a State adopts a consent requirement in addition to those described in paragraph (b) and consent is refused, paragraph (d) requires that the public agency must nevertheless provide the services and activities that are not in dispute. For example, if a State requires parental consent to the provision of all services identified in an IEP and the parent refuses to consent to physical therapy services included in the IEP, the agency is not relieved of its obligation to implement those portions of the IEP to which the parent consents.

If the parent refuses to consent and the public agency determines that the service or activity in dispute is necessary to provide FAPE to the child, paragraph (c) requires that the agency must implement its procedures to override the refusal. This section does not preclude the agency from reconsidering its proposal if it believes that circumstances warrant.

§300.505 Content of notice.

(a) The notice under §300.504 must include –

(1) A full explanation of all of the procedural safeguards available to the parents under §300.500, §§300.502-300.515, and §§300.562-300.569;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors that are relevant to the agency's proposal or refusal.

(b) The notice must be –

(1) Written in language understandable to the general public; and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the SEA or LEA shall take steps to ensure –

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice; and

(3) That there is written evidence that the requirements in paragraphs (c)(1) and (2) of this section have been met.

(Authority: 20 U.S.C. 1415(b)(1)(D))

©1993, EDLAW,Inc.

§300.506 Impartial due process hearing.

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in §300.504(a)(1) and (2).

(b) The hearing must be conducted by the SEA or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the SEA.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if –

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(Authority: 20 U.S.C. 1415(b)(2))

Note: Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of children with disabilities, and the provision of FAPE to those children. Mediations have been conducted by members of SEAs or LEA personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under §§300.500-300.515.

§300.507 Impartial hearing officer.

(a) A hearing may not be conducted –

(1) By a person who is an employee of a public agency that is involved in the education or care of the child; or

(2) By any person having a personal or professional interest that would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(Authority: 20 U.S.C. 1414(b)(2))

§300.508 Hearing rights.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities.

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses.

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing.

(4) Obtain a written or electronic verbatim record of the hearing.

(5) Obtain written findings of fact and decisions. The public agency, after deleting any personally identifiable information, shall –

(i) Transmit those findings and decisions to the State advisory panel established under §300.650; and

(ii) Make those findings and decisions available to the public.

(b) Parents involved in hearings must be given the right to –

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

(Authority: 20 U.S.C. 1415(d))

§300.509 Hearing decision; appeal.

A decision made in a hearing conducted under §300.506 is final, unless a party to the hearing appeals the decision under §300.510 or §300.511.

(Authority: 20 U.S.C. 1415(c))

§300.510 Administrative appeal; impartial review.

(a) If the hearing is conducted by a public agency other than the SEA, any party aggrieved by the findings and decision in the hearing may appeal to the SEA.

(b) If there is an appeal, the SEA shall conduct an impartial review of the hearing. The official conducting the review shall:

(1) Examine the entire hearing record.

(2) Ensure that the procedures at the hearing were consistent with the requirements of due process.

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in §300.508 apply.

(4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official.

(5) Make an independent decision on completion of the review.

(6) Give a copy of written findings and the decision to the parties.

(c) The SEA, after deleting any personally identifiable information, shall –

(1) Transmit the findings and decisions referred to in paragraph (b)(6) of this section to the State advisory panel established under §300.650; and

(2) Make those findings and decisions available to the public.

(d) The decision made by the reviewing official is final unless a party brings a civil action under §300.511.

(Authority: 20 U.S.C. 1415(c), (d); H. R. Rep. No. 94-664, at p. 49 (1975))

Note 1: The SEA may conduct its review either directly or through another State agency acting on its behalf. However, the SEA remains responsible for the final decision on review.

Note 2: All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in §300.508 relating to hearings also apply.

§300.511 Civil action.

Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under §300.510, and any party aggrieved by the decision of a reviewing officer under §300.510, has the right to bring a civil action under section 615(e)(2) of the Act.

(Authority: 20 U.S.C. 1415)

§300.512 Timelines and convenience of hearings and reviews.

(a) The public agency shall ensure that not later than 45 days after the receipt of a request for a hearing –

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The SEA shall ensure that not later than 30 days after the receipt of a request for a review –

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

(Authority: 20 U.S.C. 1415)

§300.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

©1993, EDLAW, Inc.

(Authority: 20 U.S.C. 1415(e)(3))

Note: Section 300.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

§300.514 Surrogate parents.

(a) General. Each public agency shall ensure that the rights of a child are protected when –

(1) No parent (as defined in §300.13) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) Duty of public agency. The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) Criteria for selection of surrogates. (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall ensure that a person selected as a surrogate –

(i) Has no interest that conflicts with the interest of the child he or she represents; and

(ii) Has knowledge and skills that ensure adequate representation of the child.

(d) Non-employee requirement; compensation. (1) A person assigned as a surrogate may not be an employee of a public agency that is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraphs (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) Responsibilities. The surrogate parent may represent the child in all matters relating to –

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.

(Authority: 20 U.S.C. 1415(b)(1)(B))

§300.515 Attorneys' fees.

Each public agency shall inform parents that in any action or proceeding under section 615 of the Act, courts may award parents reasonable attorneys' fees under the circumstances described in section 615(e)(4) of the Act.

(Authority: 20 U.S.C. 1415(b)(1)(D); 1415(e)(4))

PROTECTION IN EVALUATION PROCEDURES

§300.530 General.

(a) Each SEA shall ensure that each public agency establishes and implements procedures that meet the requirements of §§300.530-300.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of children with disabilities must be selected and administered so as not to be racially or culturally discriminatory.

(Authority: 20 U.S.C. 1412(5)(C))

§300.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a child with a disability in a program providing special education and related services, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of §300.532.

(Authority: 20 U.S.C. 1412(5)(C))

§300.532 Evaluation procedures.

State educational agencies and LEAs shall ensure, at a minimum, that:

(a) Tests and other evaluation materials –

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer.

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child.

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (Authority: 20 U.S.C. 1412(5)(C))

Note: Children who have a speech or language impairment as their primary disability may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each child with a speech or language impairment using procedures that are appropriate for the diagnosis and appraisal of speech and language impairments, and (2) if necessary, make referrals for additional assessments needed to make an appropriate placement decision.

§300.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall –

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Ensure that information obtained from all of these sources is documented and carefully considered;

(3) Ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Ensure that the placement decision is made in conformity with the LRE rules in §§300.550-300.554.

(b) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with §§300.340-300.350.

(Authority: 20 U.S.C. 1412(5)(C); 1414(a)(5))

Note: Paragraph (a)(1) includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to ensure that more than one source is used in interpreting evaluation data and in making placement decisions. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other children with disabilities, such as a child who has a severe articulation impairment as his primary disability. For such a child, the speech-language pathologist, in complying with the multiple source requirement, might use (1) a standardized test of articulation, and (2)

©1993, EDLAW,Inc.

observation of the child's articulation behavior in conversational speech.

§300.534 Reevaluation.

Each SEA and LEA shall ensure –

(a) That the IEP of each child with a disability is reviewed in accordance with §§300.340-300.350; and

(b) That an evaluation of the child, based on procedures that meet the requirements of §300.532, is conducted every three years, or more frequently if conditions warrant, or if the child's parent or teacher requests an evaluation.

(Authority: 20 U.S.C. 1412(5)(c))

ADDITIONAL PROCEDURES FOR EVALUATING CHILDREN WITH SPECIFIC LEARNING DISABILITIES

§300.540 Additional team members.

In evaluating a child suspected of having a specific learning disability, in addition to the requirements of §300.532, each public agency shall include on the multidisciplinary evaluation team –

(a)(1) The child's regular teacher; or

(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

(3) For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and

(b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

(Authority: 20 U.S.C. 1411 note)

§300.541 Criteria for determining the existence of a specific learning disability.

(a) A team may determine that a child has a specific learning disability if –

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, when provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas –

(i) Oral expression;
(ii) Listening comprehension;
(iii) Written expression;
(iv) Basic reading skill;
(v) Reading comprehension;
(vi) Mathematics calculation; or
(vii) Mathematics reasoning.

(b) The team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of –

(1) A visual, hearing, or motor impairment;
(2) Mental retardation;
(3) Emotional disturbance; or
(4) Environmental, cultural or economic disadvantage.

(Authority: 20 U.S.C. 1411 note)

§300.542 Observation.

(a) At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting.

(b) In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.

(Authority: 20 U.S.C. 1411 note)

§300.543 Written report.

(a) The team shall prepare a written report of the results of the evaluation.

(b) The report must include a statement of –

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination;

(3) The relevant behavior noted during the observation of the child;

(4) The relationship of that behavior to the child's academic functioning;

(5) The educationally relevant medical findings, if any;

(6) Whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services; and

(7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.

(c) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions.

(Authority: 20 U.S.C. 1411 note)

LEAST RESTRICTIVE ENVIRONMENT

§300.550 General.

(a) Each SEA shall ensure that each public agency establishes and implements procedures that meet the requirements of §§300.550-300.556.

(b) Each public agency shall ensure –

(1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(Authority: 20 U.S.C. 1412(5)(B); 1414(a)(1)(C)(iv))

§300.551 Continuum of alternative placements.

(a) Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must –

(1) Include the alternative placements listed in the definition of special education under §300.17 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(Authority: 20 U.S.C. 1412(5)(B))

§300.552 Placements.

Each public agency shall ensure that:

(a) The educational placement of each child with a disability –

(1) Is determined at least annually;

(2) Is based on his or her IEP; and

(3) Is as close as possible to the child's home.

(b) The various alternative placements included at §300.551 are available to the extent necessary to implement the IEP for each child with a disability.

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.

©1993, EDLAW,Inc.

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.

(Authority: 20 U.S.C. 1412(5)(B))

Note: Section 300.552 includes some of the main factors that must be considered in determining the extent to which a child with a disability can be educated with children who are nondisabled. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to ensure that each child with a disability receives an education that is appropriate to his or her individual needs.

The requirements of §300.552, as well as the other requirements of §§300.550-300.556, apply to all preschool children with disabilities who are entitled to receive FAPE.

Public agencies that provide preschool programs for nondisabled preschool children must ensure that the requirements of §300.552(c) are met. Public agencies that do not operate programs for nondisabled preschool children are not required to initiate such programs solely to satisfy the requirements regarding placement in the LRE embodied in §§300.550-300.556. For these public agencies, some alternative methods for meeting the requirements of §§300.550-300.556 include —

(1) Providing opportunities for the participation (even part-time) of preschool children with disabilities in other preschool programs operated by public agencies (such as Head Start);

(2) Placing children with disabilities in private school programs for nondisabled preschool children or private school preschool programs that integrate children with disabilities and nondisabled children; and

(3) Locating classes for preschool children with disabilities in regular elementary schools. In each case the public agency must ensure that each child's placement is in the LRE in which the unique needs of that child can be met, based upon the child's IEP, and meets all of the other requirements of §§300.340-300.350 and §§300.550-300.556.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (34 CFR part 104 — Appendix, Paragraph 24) includes several points regarding educational placements of children with disabilities that are pertinent to this section:

1. With respect to determining proper placements, the analysis states: "*** it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs ***."

2. With respect to placing a child with a disability in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parents' right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subpart.

§300.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in §300.306, each public agency shall ensure that each child with a disability participates with nondisabled children in those services and activities to the maximum extent appropriate to the needs of that child.

(Authority: 20 U.S.C. 1412(5)(B))

Note: Section 300.553 is taken from a requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[This paragraph] specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children." (34 CFR Part 104 — Appendix, Paragraph 24.)

§300.554 Children in public or private institutions.

Each SEA shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to ensure that §300.550 is effectively implemented.

(Authority: 20 U.S.C. 1412(5)(B))

Note: Under section 612(5)(B) of the statute, the requirement to educate children with disabilities with nondisabled children also applies to children in public and private institutions or other care facilities. Each SEA must ensure that each applicable agency and institution in the State implements this requirement. Regardless of other reasons for institutional placement, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting.

§300.555 Technical assistance and training activities.

Each SEA shall carry out activities to ensure that teachers and administrators in all public agencies —

(a) Are fully informed about their responsibilities for implementing §300.550; and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(Authority: 20 U.S.C. 1412(5)(B))

§300.556 Monitoring activities.

(a) The SEA shall carry out activities to ensure that §300.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with §300.550, the SEA shall —

(1) Review the public agency's justification for its actions; and

(2) Assist in planning and implementing any necessary corrective action.

(Authority: 20 U.S.C. 1412(5)(B))

CONFIDENTIALITY OF INFORMATION

§300.560 Definitions.

As used in §§300.560-300.576 —

"Destruction" means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

"Education records" means the type of records covered under the definition of education records in Part 99 of this title (the regulations implementing the Family Educational Rights and Privacy Act of 1974).

"Participating agency" means any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under this part.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§300.561 Notice to parents.

(a) The SEA shall give notice that is adequate to fully inform parents about the requirements of §300.128, including —

(1) A description of the extent that the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

©1993, EDLAW, Inc.

(3) A summary of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under the Family Educational Rights and Privacy Act of 1974 and implementing regulations in Part 99 of this title.

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§300.562 Access rights.

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an IEP or any hearing relating to the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes —

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§300.563 Record of access.

Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under this part (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§300.564 Records on more than one child.

If any education record includes information on more than one child, the parents of those children shall have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§300.565 List of types and locations of information.

Each participating agency shall provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§300.566 Fees.

(a) Each participating agency may charge a fee for copies of records that are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§300.567 Amendment of records at parent's request.

(a) A parent who believes that information in the education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child may request the participating agency that maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request, it shall inform the parent of the refusal, and advise the parent of the right to a hearing under §300.568.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§300.568 Opportunity for a hearing.

The agency shall, on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§300.569 Result of hearing.

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy of other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must —

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§300.570 Hearing procedures.

A hearing held under §300.568 must be conducted according to the procedures under §99.22 of this title.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§300.571 Consent.

(a) Parental consent must be obtained before personally identifiable information is —

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement of this part.

(b) An educational agency or institution subject to Part 99 of this title may not release information from education records to participating agencies without parental consent unless authorized to do so under Part 99 of this title.

BEST COPY AVAILABLE

©1993, EDLAW,Inc.

(c) The SEA shall include policies and procedures in its State plan that are used in the event that a parent refuses to provide consent under this section.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§300.572 Safeguards.

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall assume responsibility for ensuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under §300.129 and Part 99 of this title.

(d) Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§300.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

Note: Under §300.573, the personally identifiable information on a child with a disability may be retained permanently unless the parents request that it be destroyed. Destruction of records is the best protection against improper and unauthorized disclosure. However, the records may be needed for other purposes. In informing parents about their rights under this section, the agency should remind them that the records may be needed by the child or the parents for social security benefits or other purposes. If the parents request that the information be destroyed, the agency may retain the information in paragraph (b).

§300.574 Children's rights.

The SEA shall include policies and procedures in its State plan regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

Note: Under the regulations for the Family Educational Rights and Privacy Act of 1974 (34 CFR 99.5(a)), the rights of parents regarding education records are transferred to the student at age 18.

§300.575 Enforcement.

The SEA shall describe in its State plan the policies and procedures, including sanctions, that the State uses to ensure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met. (Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§300.576 Department.

If the Department or its authorized representatives collect any personally identifiable information regarding children with disabilities that is not subject to 5 U.S.C. 552a (The Privacy Act of 1974), the Secretary shall apply the requirements of 5 U.S.C. section 552a (b)(1)-(2), (4)-(11); (c); (d); (e)(1); (2); (3)(A), (B), and (D), (5)-(10); (h); (m); and (n), and the regulations implementing those provisions in Part 5b of this title.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

DEPARTMENT PROCEDURES

§300.580 [Reserved]

§300.581 Disapproval of a State plan.

Before disapproving a State plan, the Secretary gives the SEA written notice and an opportunity for a hearing.

(Authority: 20 U.S.C. 1413(c))

§300.582 Content of notice.

(a) In the written notice, the Secretary –

(1) States the basis on which the Secretary proposes to disapprove the State plan;

(2) May describe possible options for resolving the issues;

(3) Advises the SEA that it may request a hearing and that the request for a hearing must be made not later than 30 calendar days after it receives the notice of proposed disapproval; and (4) Provides information about the procedures followed for a hearing.

(b) The Secretary sends the written notice to the SEA by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1413(c))

§300.583 Hearing official or panel.

(a) If the SEA requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this program, to conduct a hearing.

(b) If more than one individual is designated, the Secretary designates one of those individuals as the Chief Hearing Official of the Hearing Panel. If one individual is designated, that individual is the Hearing Official.

(Authority: 20 U.S.C. 1413(c))

§300.584 Hearing procedures.

(a) As used in §§300.581-300.586 the term "party or parties" means the following:

(1) An SEA that requests a hearing regarding the proposed disapproval of its State plan under this part.

(2) The Department of Education official who administers the program of financial assistance under this part.

(3) A person, group or agency with an interest in and having relevant information about the case that has applied for and been granted leave to intervene by the Hearing Official or Panel.

(b) Within 15 calendar days after receiving a request for a hearing, the Secretary designates a Hearing Official or Panel and notifies the parties.

(c) The Hearing Official or Panel may regulate the course of proceedings and the conduct of the parties during the proceedings. The Hearing Official or Panel takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order, including the following:

(1) The Hearing Official or Panel may hold conferences or other types of appropriate proceedings to clarify, simplify, or define the issues or to consider other matters that may aid in the disposition of the case.

(2) The Hearing Official or Panel may schedule a prehearing conference of the Hearing Official or Panel and parties.

(3) Any party may request the Hearing Official or Panel to schedule a prehearing or other conference. The Hearing Official or Panel decides whether a conference is necessary and notifies all parties.

(4) At a prehearing or other conference, the Hearing Official or Panel and the parties may consider subjects such as –

(i) Narrowing and clarifying issues;

(ii) Assisting the parties in reaching agreements and stipulations;

(iii) Clarifying the positions of the parties;

(iv) Determining whether an evidentiary hearing or oral argument should be held; and

(v) Setting dates for –

©1993, EDLAW, Inc.

(A) The exchange of written documents;

(B) The receipt of comments from the parties on the need for oral argument or evidentiary hearing;

(C) Further proceedings before the Hearing Official or Panel (including an evidentiary hearing or oral argument, if either is scheduled);

(D) Requesting the names of witnesses each party wishes to present at an evidentiary hearing and estimation of time for each presentation; or

(E) Completion of the review and the initial decision of the Hearing Official or Panel.

(5) A prehearing or other conference held under paragraph (b)(4) of this section may be conducted by telephone conference call.

(6) At a prehearing or other conference, the parties shall be prepared to discuss the subjects listed in paragraph (b)(4) of this section.

(7) Following a prehearing or other conference the Hearing Official or Panel may issue a written statement describing the issues raised, the action taken, and the stipulations and agreements reached by the parties.

(d) The Hearing Official or Panel may require parties to state their positions and to provide all or part of the evidence in writing.

(e) The Hearing Official or Panel may require parties to present testimony through affidavits and to conduct cross-examination through interrogatories.

(f) The Hearing Official or Panel may direct the parties to exchange relevant documents or information and lists of witnesses, and to send copies to the Hearing Official or Panel.

(g) The Hearing Official or Panel may receive, rule on, exclude, or limit evidence at any stage of the proceedings.

(h) The Hearing Official or Panel may rule on motions and other issues at any stage of the proceedings.

(i) The Hearing Official or Panel may examine witnesses.

(j) The Hearing Official or Panel may set reasonable time limits for submission of written documents.

(k) The Hearing Official or Panel may refuse to consider documents or other submissions if they are not submitted in a timely manner unless good cause is shown.

(l) The Hearing Official or Panel may interpret applicable statutes and regulations but may not waive them or rule on their validity.

(m)(1) The parties shall present their positions through briefs and the submission of other documents and may request an oral argument or evidentiary hearing. The Hearing Official or Panel shall determine whether an oral argument or an evidentiary hearing is needed to clarify the positions of the parties.

(2) The Hearing Official or Panel gives each party an opportunity to be represented by counsel.

(n) If the Hearing Official or Panel determines that an evidentiary hearing would materially assist the resolution of the matter, the Hearing Official or Panel gives each party, in addition to the opportunity to be represented by counsel —

(1) An opportunity to present witnesses on the party's behalf; and

(2) An opportunity to cross-examine witnesses either orally or with written questions.

(o) The Hearing Official or Panel accepts any evidence that it finds is relevant and material to the proceedings and is not unduly repetitious.

(p)(1) The Hearing Official or Panel —

(i) Arranges for the preparation of a transcript of each hearing;

(ii) Retains the original transcript as part of the record of the hearing; and

(iii) Provides one copy of the transcript to each party.

(2) Additional copies of the transcript are available on request and with payment of the reproduction fee.

(q) Each party shall file with the Hearing Official or Panel all written motions, briefs, and other documents and shall at the same time provide a copy to the other parties to the proceedings.

(Authority: 20 U.S.C. 1413(c))

§300.585 Initial decision; final decision.

(a) The Hearing Official or Panel prepares an initial written decision that addresses each of the points in the notice sent by the Secretary to the SEA under §300.582.

(b) The initial decision of a Panel is made by a majority of Panel members.

(c) The Hearing Official or Panel mails by certified mail with return receipt requested a copy of the initial decision to each party (or to the party's counsel) and to the Secretary, with a notice stating that each party has an opportunity to submit written comments regarding the decision to the Secretary.

(d) Each party may file comments and recommendations on the initial decision with the Hearing Official or Panel within 15 calendar days of the date the party receives the Panel's decision.

(e) The Hearing Official or Panel sends a copy of a party's initial comments and recommendations to the other parties by certified mail with return receipt requested. Each party may file responsive comments and recommendations with the Hearing Official or Panel within seven calendar days of the date the party receives the initial comments and recommendations.

(f) The Hearing Official or Panel forwards the parties' initial and responsive comments on the initial decision to the Secretary who reviews the initial decision and issues a final decision.

(g) The initial decision of the Hearing Official or Panel becomes the final decision of the Secretary unless, within 25 calendar days after the end of the time for receipt of written comments, the Secretary informs the Hearing Official or Panel and the parties to a hearing in writing that the decision is being further reviewed for possible modification.

(h) The Secretary may reject or modify the initial decision of the Hearing Official or Panel if the Secretary finds that it is clearly erroneous.

(i) The Secretary conducts the review based on the initial decision, the written record, the Hearing Official's or Panel's proceedings, and written comments. The Secretary may remand the matter for further proceedings.

(j) The Secretary issues the final decision within 30 calendar days after notifying the Hearing Official or Panel that the initial decision is being further reviewed.

§300.586 Judicial review.

If a State is dissatisfied with the Secretary's final action with respect to its State plan, the State may, within 60 calendar days after notice of that action, file a petition for review with the United States court of appeals for the circuit in which the State is located.

(Authority: 20 U.S.C. 1416(b)(1))

§§300.587-300.588 [Reserved]

§300.589 Waiver of requirement regarding supplementing and supplanting with Part B funds.

(a) Under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act, SEAs and LEAs must ensure that Federal funds provided under this part are used to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of SEAs or LEAs) expended for special education and related services provided to children with disabilities under this part and in no case to supplant those Federal, State, and local funds. The nonsupplanting requirement applies only to funds allocated to LEAs (See §300.372).

(b) If the State provides clear and convincing evidence that all children with disabilities have FAPE available to them, the Secretary may waive in part the requirement under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act if the Secretary concurs with the evidence provided by the State.

©1993, EDLAW, Inc.

(c) If a State wishes to request a waiver, it must inform the Secretary in writing. The Secretary then provides the State with a finance and membership report form that provides the basis for the request.

(d) In its request for a waiver, the State shall include the results of a special study made by the State to obtain evidence of the availability of FAPE to all children with disabilities. The special study must include statements by a representative sample of organizations that deal with children with disabilities, and parents and teachers of children with disabilities, relating to the following areas –

(1) The adequacy and comprehensiveness of the State's system for identifying, locating, and evaluating children with disabilities;

(2) The cost to parents, if any, for education for children enrolled in public and private day schools, and in public and private residential schools and institutions; and

(3) The adequacy of the State's due process procedures.

(e) In its request for a waiver, the State shall include finance data relating to the availability of FAPE for all children with disabilities, including –

(1) The total current expenditures for regular education programs and special education programs by function and by source of funds (State, local, and Federal) for the previous school year; and

(2) The full-time equivalent membership of students enrolled in regular programs and in special programs in the previous school year.

(f) The Secretary considers the information that the State provides under paragraphs (d) and (e) of this section, along with any additional information he may request, or obtain through on-site reviews of the State's education programs and records, to determine if all children have FAPE available to them, and if so, the extent of the waiver.

(g) The State may request a hearing with regard to any final action by the Secretary under this section.

(Authority: 20 U.S.C. 1411(c)(3); 1413(a)(9)(B))

Subpart F – State Administration

GENERAL

§300.600 Responsibility for all educational programs.

(a) The SEA is responsible for ensuring –

(1) That the requirements of this part are carried out; and

(2) That each educational program for children with disabilities administered within the State, including each program administered by any other public agency –

(i) Is under the general supervision of the persons responsible for educational programs for children with disabilities in the SEA; and

(ii) Meets the education standards of the SEA (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

(c) This part may not be construed to limit the responsibility of agencies other than educational agencies for providing or paying some or all of the costs of FAPE to children with disabilities in the State.

(Authority: 20 U.S.C. 1412(6))

Note: The requirement in §300.600(a) is taken essentially verbatim from section 612(6) of the statute and reflects the desire of the Congress for a central point of responsibility and accountability in the education of children with disabilities within each State. With respect to SEA responsibility, the Senate Report on Pub. L. 94-142 includes the following statements:

> This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency ***.
>
> Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.
>
> (S. Rep. No. 94-168, p. 24 (1975))

In meeting the requirements of this section, there are a number of acceptable options that may be adopted, including the following:

(1) Written agreements are developed between respective State agencies concerning SEA standards and monitoring. These agreements are binding on the local or regional counterparts of each State agency.

(2) The Governor's Office issues an administrative directive establishing the SEA responsibility.

(3) State law, regulation, or policy designates the SEA as responsible for establishing standards for all educational programs for individuals with disabilities, and includes responsibility for monitoring.

(4) State law mandates that the SEA is responsible for all educational programs.

§300.601 Relation of Part B to other Federal programs.

This part may not be construed to permit a State to reduce medical and other assistance available to children with disabilities, or to alter the eligibility of a child with a disability, under Title V (Maternal and Child Health) or Title XIX (Medicaid) of the Social Security Act, to receive services that are also part of FAPE.

(Authority: 20 U.S.C. 1413(e))

USE OF FUNDS

§300.620 Federal funds for State administration.

A State may use five percent of the total State allotment in any fiscal year under Part B of the Act, or $450,000, whichever is greater, for administrative costs related to carrying out sections 612 and 613 of the Act. However, this amount cannot be greater than twenty-five percent of the State's total allotment for the fiscal year under Part B of the Act.

(Authority: 20 U.S.C. 1411(b), (c))

§300.621 Allowable costs.

(a) The SEA may use funds under §300.620 for –

(1) Administration of the State plan and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of children with disabilities;

(2) Approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of children with disabilities;

(3) Technical assistance to LEAs with respect to the requirements of this part;

(4) Leadership services for the program supervision and management of special education activities for children with disabilities; and

(5) Other State leadership activities and consultative services.

(b) The SEA shall use the remainder of its funds under §300.620 in accordance with §300.370.

(Authority: 20 U.S.C. 1411(b), (c))

STATE ADVISORY PANEL

§300.650 Establishment.

(a) Each State shall establish, in accordance with the provisions of §§300.650-300.653, a State advisory panel on the education of children with disabilities.

(b) The advisory panel must be appointed by the Governor or any other official authorized under State law to make those appointments.

©1993, EDLAW, Inc.

(c) If a State has an existing advisory panel that can perform the functions in §300.652, the State may modify the existing panel so that it fulfills all of the requirements of §§300.650-300.653, instead of establishing a new advisory panel. (Authority: 20 U.S.C. 1413(a)(12))

§300.651 Membership.

(a) The membership of the State advisory panel must be composed of persons involved in or concerned with the education of children with disabilities. The membership must include at least one person representative of each of the following groups –

(1) Individuals with disabilities;
(2) Teachers of children with disabilities;
(3) Parents of children with disabilities;
(4) State and local educational officials; and
(5) Special education program administrators.

(b) The State may expand the advisory panel to include additional persons in the groups listed in paragraph (a) of this section and representatives of other groups not listed.

(Authority: 20 U.S.C. 1413(a)(12))

Note: The membership of the State advisory panel, as listed in paragraphs (a)(1)-(5), is required in section 613(a)(12) of the Act. As indicated in paragraph (b), the composition of the panel and the number of members may be expanded at the discretion of the State. In adding to the membership, consideration could be given to having –

(1) An appropriate balance between professional groups and consumers (i.e., parents, advocates, and individuals with disabilities);

(2) Broad representation within the consumer-advocate groups, to ensure that the interests and points of view of various parents, advocates and individuals with disabilities are appropriately represented;

(3) Broad representation within professional groups (e.g., regular education personnel: special educators, including teachers, teacher trainers, and administrators, who can properly represent various dimensions in the education of children with disabilities; and appropriate related services personnel); and

(4) Representatives from other State advisory panels (such as vocational education).

If a State elects to maintain a small advisory panel (e.g., 10-15 members), the panel itself could take steps to ensure that it (1) consults with and receives inputs from various consumer and special interest professional groups, and (2) establishes committees for particular short-term purposes composed of representatives from those input groups.

§300.652 Advisory panel functions.

The State advisory panel shall –

(a) Advise the SEA of unmet needs within the State in the education of children with disabilities;

(b) Comment publicly on the State plan and rules or regulations proposed for issuance by the State regarding the education of children with disabilities and the procedures for distribution of funds under this part; and

(c) Assist the State in developing and reporting such information and evaluations as may assist the Secretary in the performance of his responsibilities under section 618 of the Act. (Authority: 20 U.S.C. 1413(a)(12))

§300.653 Advisory panel procedures.

(a) The advisory panel shall meet as often as necessary to conduct its business.

(b) By July 1 of each year, the advisory panel shall submit an annual report of panel activities and suggestions to the SEA. This report must be made available to the public in a manner consistent with other public reporting requirements of this part.

(c) Official minutes must be kept on all panel meetings and shall be made available to the public on request.

(d) All advisory panel meetings and agenda items must be publicly announced prior to the meeting, and meetings must be open to the public.

(e) Interpreters and other necessary services must be provided at panel meetings for panel members or participants. The State may pay for these services from funds under §300.620.

(f) The advisory panel shall serve without compensation but the State must reimburse the panel for reasonable and necessary expenses for attending meetings and performing duties. The State may use funds under §300.620 for this purpose.

(Authority: 20 U.S.C. 1413(a)(12))

STATE COMPLAINT PROCEDURES

§300.660 Adoption of State complaint procedures.

Each SEA shall adopt written procedures for:

(a) Resolving any complaint that meets the requirements of §300.662 by –

(1) Providing for the filing of a complaint with the SEA; and

(2) At the SEA's discretion, providing for the filing of a complaint with a public agency and the right to have the SEA review the public agency's decision on the complaint.

(b) Informing parents and other interested individuals about the procedures in §§300.660-300.662.

(Authority: 20 U.S.C. 2831(a))

§300.661 Minimum State complaint procedures.

Each SEA shall include the following in its complaint procedures:

(a) A time limit of 60 calendar days after a complaint is filed under §300.660(a) to –

(1) Carry out an independent on-site investigation, if the SEA determines that such an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or of this part; and

(4) Issue a written decision to the complainant that addresses each allegation in the complaint and contains –

(i) Findings of fact and conclusions; and
(ii) The reasons for the SEA's final decision.

(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) Procedures for effective implementation of the SEA's final decision, if needed, including technical assistance activities, negotiations, and corrective actions to achieve compliance.

(d) The right of the complainant or the public agency to request the Secretary to review the SEA's final decision.

(Authority: 20 U.S.C. 2831(a))

§300.662 Filing a complaint.

An organization or individual may file a signed written complaint under the procedures described in §§300.600-300.661. The complaint must include –

(a) A statement that a public agency has violated a requirement of Part B of the Act or of this part; and

(b) The facts on which the statement is based.

(Authority: 20 U.S.C. 2831(a))

©1993, EDLAW,Inc.

Subpart G – Allocation of Funds; Reports

ALLOCATIONS

§300.700 Special definition of the term State.

For the purposes of §300.701, §300.702, and §§300.704- 300.708, the term "State" does not include Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, or Palau.

(Authority: 20 U.S.C. 1411(a)(2))

§300.701 State entitlement; formula.

(a) The Secretary calculates the maximum amount of the grant to which a State is entitled under section 611 of the Act in any fiscal year as follows:

(1) If the State is eligible for a grant under section 619 of the Act, the maximum entitlement is equal to the number of children with disabilities aged 3 through 21 in the State who are receiving special education and related services, multiplied by 40 percent of the average per pupil expenditure in public elementary and secondary schools in the United States.

(2) If the State is not eligible for a grant under section 619 of the Act, the maximum entitlement is equal to the number of children with disabilities aged 6 through 21 in the State who are receiving special education and related services, multiplied by 40 percent of the average per pupil expenditure in public elementary and secondary schools in the United States.

(Authority: 20 U.S.C. 1411(a)(1))

(b) [Reserved]

(c) For the purposes of this section, the "average per pupil expenditure in public elementary and secondary schools in the United States," means the aggregate expenditures during the second fiscal year preceding the fiscal year for which the computation is made (or if satisfactory data for that year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all LEAs in the United States (which, for the purpose of this section, means the 50 States and the District of Columbia), plus any direct expenditures by the State for operation of those agencies (without regard to the source of funds from which either of those expenditures are made), divided by the aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year.

(Authority: 20 U.S.C. 1411(a)(4))

§300.702 Limitations and exclusions.

(a) In determining the amount of a grant under §300.701:

(1) If a State serves all children with disabilities aged 3 through 5 in the State, the Secretary does not count children with disabilities aged 3 through 17 in the State to the extent that the number of those children is greater than 12 percent of the number of all children aged 3 through 17 in the State.

(2) If a State does not serve all children with disabilities aged 3 through 5 in the State, the Secretary does not count children with disabilities aged 5 through 17 to the extent that the number of those children is greater than 12 percent of the number of all children aged 5 through 17 in the State.

(3) The Secretary does not count children with disabilities who are counted under Subpart 2 of Part D of Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965.

(b) For the purposes of paragraph (a) of this section, the number of children aged 3 through 17 and 5 through 17 in any State is determined by the Secretary on the basis of the most recent satisfactory data available.

(Authority: 20 U.S.C. 1411(a)(5))

§300.703 Ratable reductions.

(a) General. If the sums appropriated for any fiscal year for making payments to States under section 611 of the Act are not sufficient to pay in full the total amounts that all States are entitled to receive for that fiscal year, the maximum amount that all States are entitled to receive for that fiscal year shall be ratably reduced. In case additional funds become available for making payments for any fiscal year during which the preceding sentence is applicable, those reduced amounts shall be increased on the same basis they were reduced.

(Authority: 20 U.S.C. 1411(g)(1))

(b) Reporting dates for Local educational agencies and reallocations.

(1) In any fiscal year that the State entitlement has been ratably reduced, and that additional funds have not been made available to pay in full the total of the amounts under paragraph (a) of this section, the SEA shall fix dates before which each LEA shall report to the State the amount of funds available to it under this part that it estimates it will expend.

(2) The amounts available under paragraph (a) of this section, or any amount that would be available to any other LEA if it were to submit an application meeting the requirements of this part, that the SEA determines will not be used for the period of its availability shall be available for allocation to those LEAs, in the manner provided in §300.707, that the SEA determines will need and be able to use additional funds to carry out approved programs.

(Authority: 20 U.S.C. 1411(g)(2))

§300.704 Hold harmless provision.

No State shall receive less than the amount it received under Part B of the Act for fiscal year 1977.

(Authority: 20 U.S.C. 1411(a)(1))

§300.705 Allocation for State in which by-pass is implemented for private school children with disabilities.

In determining the allocation under §§300.700-300.703 of a State in which the Secretary will implement a by-pass for private school children with disabilities under §§300.451-300.486, the Secretary includes in the State's child count –

(a) For the first year of a by-pass, the actual or estimated number of private school children with disabilities (as defined in §§300.7(a) and 300.450) in the State, as of the preceding December 1; and

(b) For succeeding years of a by-pass, the number of private school children with disabilities who received special education and related services under the by-pass in the preceding year.

(Authority: 20 U.S.C. 1411(a)(1)(A), 1411(a)(3), 1413(d))

§300.706 Within-State distribution: fiscal year 1979 and after.

Of the funds received under §300.701 by any State for fiscal year 1979, and for each fiscal year after fiscal year 1979 –

(a) 25 percent may be used by the State in accordance with §300.620 and §300.370; and

(b) 75 percent shall be distributed to the LEAs in the State in accordance with §300.707.

(Authority: 20 U.S.C. 1411(c)(1))

§300.707 Local educational agency entitlement; formula.

From the total amount of funds available to all LEAs, each LEA is entitled to an amount that bears the same ratio to the total amount as the number of children with disabilities aged 3 through 21 in that agency who are receiving special education and related services bears to the aggregate number of children with disabilities aged 3 through 21 receiving special education and related services in all LEAs that apply to the SEA for funds under Part B of the Act.

(Authority: 20 U.S.C. 1411(d))

©1993, EDLAW, Inc.

§300.708 Reallocation of local educational agency funds.

If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities residing in the area served by the local agency with State and local funds otherwise available to the local agency, the SEA may reallocate funds (or portions of those funds that are not required to provide special education and related services) made available to the local agency under §300.707, to other LEAs within the State that are not adequately providing special education and related services to all children with disabilities residing in the areas served by the other LEAs.

(Authority: 20 U.S.C. 1414(e))

§ 300.709 Payments to the Secretary of the Interior for the education of Indian children.

(a) General. (1) The Secretary makes payments to the Secretary of the Interior to meet the need for assistance for the education of children with disabilities on reservations, aged 5 through 21, who are enrolled in elementary and secondary schools for Indian children operated or funded by the Secretary of the Interior.

(2) In the case of Indian students aged 3 through 5 who are enrolled in programs affiliated with Bureau of Indian Affairs (BIA) schools that are required by the States in which the schools are located to attain or maintain State accreditation and had State accreditation prior to October 7, 1991, the schools may count those children for the purpose of distribution of the funds provided under paragraph (a)(1) of this section to the Secretary of the Interior.

(3) The amount of the payment under paragraph (a)(1) of this section for any fiscal year is one percent of the aggregate amounts available to all States under this part for that fiscal year.

(b) Responsibility for meeting the requirements of Part B. The Secretary of the Interior shall be responsible for meeting all of the requirements of Part B of the Act for the children described in paragraph (a) of this section, in accordance with §300.260.

(Authority: 20 U.S.C. 1411(f))

§300.710 Payments to the Secretary of the Interior for Indian tribes or tribal organizations.

(a) General. (1) Beginning with funds appropriated under Part B of the Act for fiscal year 1992, the Secretary, subject to this section, makes payments to the Secretary of the Interior to be distributed to tribes or tribal organizations (as defined under section 4 of the Indian Self-Determination and Education Assistance Act) or consortiums of those tribes or tribal organizations to provide for the coordination of assistance for special education and related services for children with disabilities, aged 3 through 5, on reservations served by elementary and secondary schools for Indian children operated or funded by the Department of the Interior.

(2) The amount of the payment under paragraph (b)(1) of this section for any fiscal year is .25 percent of the aggregate amounts available for all States under this part for that fiscal year.

(3) None of the funds allocated under this section may be used by the Secretary of the Interior for administrative purposes, including child count, and the provision of technical assistance.

(b) Distribution of funds. (1) The Secretary of the Interior shall distribute the total amount of the .25 percent under paragraph (a) of this section in accordance with section 611(f)(4) of the Act.

(Authority: 20 U.S.C. 1411(f))

§300.711 Entitlements to jurisdictions.

(a) The jurisdictions to which this section applies are Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and Palau, (until the Compact of Free Association with Palau takes effect pursuant to section 101(a) of Pub. L. 99-658).

(b) Each jurisdiction under paragraph (a) of this section is entitled to a grant for the purposes set forth in section 601(c) of the Act. The amount to which those jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 percent of the aggregate of the amounts available to all States under this part for that fiscal year. Funds appropriated for those jurisdictions shall be allocated proportionately among them on the basis of the number of children aged 3 through 21 in each jurisdiction. However, no jurisdiction shall receive less than $150,000, and other allocations shall be ratably reduced if necessary to ensure that each jurisdiction receives at least that amount.

(c) The amount expended for administration by each jurisdiction under this section shall not exceed 5 percent of the amount allotted to the jurisdiction for any fiscal year, or $35,000, whichever is greater.

(Authority: 20 U.S.C. 1411(e))

REPORTS

§300.750 Annual report of children served — report requirement.

(a) The SEA shall report to the Secretary no later than February 1 of each year the number of children with disabilities aged 3 through 21 residing in the State who are receiving special education and related services.

(Authority: 20 U.S.C. 1411(a)(3))

(b) The SEA shall submit the report on forms provided by the Secretary.

(Authority: 20 U.S.C. 1411(a)(3))

Note: It is very important to understand that this report and the requirements that relate to it are solely for allocation purposes. The population of children the State may count for allocation purposes may differ from the population of children to whom the State must make FAPE available. For example, while section 611(a)(5) of the Act limits the number of children who may be counted for allocation purposes to 12 percent of the general school population aged 3 through 17 (in States that serve all children with disabilities aged 3 through 5) or 5 through 17 (in States that do not serve all children with disabilities aged 3 through 5), a State might find that 14 percent (or some other percentage) of its children have disabilities. In that case, the State must make FAPE available to all of those children with disabilities.

§300.751 Annual report of children served — information required in the report.

(a) In its report, the SEA shall include a table that shows —

(1) The number of children with disabilities receiving special education and related services on December 1 of that school year;

(2) The number of children with disabilities aged 3 through 5 who are receiving FAPE;

(3) The number of those children with disabilities aged 6 through 21 within each disability category, as defined in the definition of "children with disabilities" in §300.7; and

(4) The number of those children with disabilities aged 3 through 21 for each year of age (3, 4, 5, etc.).

(b) For the purpose of this part, a child's age is the child's actual age on the date of the child count: December 1.

(c) The SEA may not report a child aged 6 through 21 under more than one disability category.

(d) If a child with a disability aged 6 through 21 has more than one disability, the SEA shall report that child in accordance with the following procedure:

(1) A child with deaf-blindness must be reported under the category "deaf-blindness."

(2) A child who has more than one disability (other than deaf-blindness) must be reported under the category "multiple disabilities."

(Authority: 20 U.S.C. 1411(a)(3); (5)(A)(ii); 1418(b))

©1993, EDLAW, Inc.

§300.752 Annual report of children served – certification.

The SEA shall include in its report a certification signed by an authorized official of the agency that the information provided is an accurate and unduplicated count of children with disabilities receiving special education and related services on the dates in question.

(Authority: 20 U.S.C. 1411(a)(3); 1417(b))

§300.753 Annual report of children served – criteria for counting children.

(a) The SEA may include in its report children with disabilities who are enrolled in a school or program that is operated or supported by a public agency, and that either –

(1) Provides them with both special education and related services; or

(2) Provides them only with special education if they do not need related services to assist them in benefitting from that special education.

(b) The SEA may not include children with disabilities in its report who –

(1) Are not enrolled in a school or program operated or supported by a public agency;

(2) Are not provided special education that meets State standards;

(3) Are not provided with a related service that they need to assist them in benefitting from special education;

(4) Are counted by a State agency under Subpart 2 of Part D of Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965; or

(5) Are receiving special education funded solely by the Federal Government. However, the State may count children covered under §300.186(b).

(Authority: 20 U.S.C. 1411(a)(3); 1417(b))

Note 1: Under paragraph (a), the State may count children with disabilities in a Head Start or other preschool program operated or supported by a public agency if those children are provided special education that meets State standards.

Note 2: Special education, by statutory definition, must be at no cost to parents. As of September 1, 1978, under the FAPE requirement, both special education and related services must be at no cost to parents.

There may be some situations, however, where a child receives special education from a public source at no cost, but whose parents pay for the basic or regular education. This child may be counted. The Department expects that there would only be limited situations where special education would be clearly separate from regular education – generally, where speech services is the only special education required by the child. For example, the child's parents may have enrolled the child in a regular program in a private school, but the child might be receiving speech services in a program funded by the LEA. Allowing these children to be counted will provide incentives (in addition to complying with the legal requirement in section 613(a)(4)(A) of the Act regarding private schools) to public agencies to provide services to children enrolled by their parents in private schools, since funds are generated in part on the basis of the number of children provided special education and related services. Agencies should understand, however, that if a public agency places or refers a child with a disability to a public or private school for educational purposes, special education includes the entire educational program provided to the child. In that case, parents may not be charged for any part of the child's education.

A State may not count Indian children on or near reservations and children on military facilities if it provides them no special education. If an SEA or LEA is responsible for serving these children, and does provide them special education and related services, they may be counted.

§300.754 Annual report of children served – other responsibilities of the State educational agency.

In addition to meeting the other requirements of §§300.750-300.753, the SEA shall –

(a) Establish procedures to be used by LEAs and other educational institutions in counting the number of children with disabilities receiving special education and related services;

(b) Set dates by which those agencies and institutions must report to the SEA to ensure that the State complies with §300.750(a);

(c) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under §§300.750-300.753; and

(e) Ensure that documentation is maintained that enables the State and the Secretary to audit the accuracy of the count.

(Authority: 20 U.S.C. 1411(a)(3); 1417(b))

Note: States should note that the data required in the annual report of children served are not to be transmitted to the Secretary in personally identifiable form. States are encouraged to collect these data in non-personally identifiable form.

©1993, EDLAW,Inc.

Preschool Grants for Children with Disabilities

34 CFR 301

Subpart A - General

§301.1 What is the Preschool Grants for Children with Disabilities Program?

The Preschool Grants for Children with Disabilities program (Preschool Grants program) provides grants to States to assist them in

(a) Providing special education and related services to children with disabilities aged three through five years, and, at a State's discretion, providing a free appropriate public education to two-year-old children with disabilities who will reach age three during the school year;

(b) Planning and developing a statewide comprehensive delivery system for children children with disabilities from birth through age five years; and

(c) Providing direct and support services to children with disabilities aged three through five years.

(Authority: 20 U.S.C. 1419)

§301.2 Who is eligible for an award?

(a) The Secretary makes a grant to each State that submits an application that meets the requirements of this part.

(b) A State may make a subgrant to any local educational agency (LEA) and intermediate educational unit (IEU) that submits an approvable application to the State educational agency (SEA).

(Authority: 20 U.S.C. 1419)

§301.3 What kinds of activities may be assisted?

Under the Preschool Grants program, the Secretary makes a grant to a State to conduct the following activities:

(a) Provide subgrants to LEAs and IEUs to assist them in providing special education and related services to children with disabilities aged three through five years, and, if consistent with State policy, provide a free appropriate public education to two-year-old children with disabilities who will reach age three during the school year, whether or not those children are receiving, or have received, services under Part H of the Act.

(b) Plan and develop a statewide comprehensive service delivery system for children with disabilities from birth through age five years.

(c) Provide direct and support services from the SEA to children with disabilities aged three through five years, and, at the State's discretion, provide a free appropriate public education, in accordance with the Act, to two-year-old children with disabilities who will reach age three during the school year, whether or not those children are receiving, or have received, services under Part H.

(Authority: 20 U.S.C. 1419)

§301.4 What regulations apply?

The following regulations apply to the Preschool Grants program:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 76 (State-Administered Programs), Part 77 (Definitions that Apply to Department Regulations), Part 79 (Intergovernmental Review of Department of Education Programs), Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments) and Part 85 (Government-wide Debarment and Suspension (Non-procurement).)

(b) The regulations in this Part 301.

(c) The regulations in 34 CFR Part 300.

(Authority: 20 U.S.C. 1419)

§301.5 What definitions apply?

(a) Definition in the Act. The following terms used in this part are defined in the Act.

Intermediate educational unit
Local educational agency
State
State educational agency

(b) Definitions in EDGAR. The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
Award
EDGAR
Fiscal year
Grant period
Secretary
Subgrant

(c) Other definitions. The following definitions also apply to this part:

"Act" means the Individuals with Disabilities Education Act, as amended.

"Comprehensive service delivery system" means a State's plans and procedures, including goals and objectives, for identifying all children with disabilities from birth through age five years and providing special education and related services to those children in accordance with State law, policy, or practice.

"Excess appropriation" means that portion of each appropriation for fiscal years 1987, 1988, and 1989 remaining after the maximum amount of funds for each child counted has been awarded to States based on the most recent child count of children with disabilities aged three through five years receiving special education and related services.

"Part B child count" means the child count required by section 611(a)(3) of the Act.

"Preschool" means the age range of three through five years.

(Authority: 20 U.S.C. 1402, 1419)

§301.6 Does Part H of the Act apply to two-year-old children with disabilities?

Part H of the Act does not apply to any child with disabilities receiving a free appropriate public education, in accordance with Part B of the Act, with funds received under the Preschool Grants program.

(Authority: 20 U.S.C. 1419(g))

Subpart B - How Does A State Apply For A Grant?

§301.10 How does a State become eligible to receive a grant?

(a) For fiscal years 1988, 1989, and 1990 a State is eligible to receive a grant if

(1) The Secretary approves its State plan under 34 CFR Part 300;

(2) The State provides education and related services to any children with disabilities aged three through five years; and

(3) The State submits an application to the Secretary that meets the requirements of this part.

(b) Beginning in fiscal year 1991, a State is eligible to receive a grant if

(1) The Secretary approves its State plan under 34 CFR Part 300;

(2) The State has policies and procedures in its State plan under 34 CFR Part 300 that assure the provision of a free appropriate public education –

(i) For all children with disabilities aged three through five years in accordance with the requirements in 34 CFR Part 300; and

©1993, EDLAW,Inc.

(b) The State is not eligible for funds under 34 CFR Part 300 for handicapped children aged three through five years;

(c) No State, LEA, IEU, or other public institution or agency is eligible for a grant under Parts C through G of the Act if the grant relates exclusively to programs, projects, and activities pertaining to handicapped children aged three through five years; and

(d) The State is not eligible for funds for three through five-year-old children served under 34 CFR Part 302.

(Authority: 20 U.S.C. 1408; 1411(a)(1)(A); 1419(a),(b))

Subpart C - How Does The Secretary Make A Grant To A State?

§301.20 What requirements apply to estimating the number of handicapped children who will be served in order to receive funds from an excess appropriation?

(a) In order to receive funds from an excess appropriation based on an estimated increase in the number of handicapped children aged three through five years who will be receiving special education and related services under Part B of the Act on December 1 of the year following the most recent Part B child count, a State must –

(1) Have an increase in the total number of handicapped children aged three through five years served under both 34 CFR Parts 300 and 302 from the previous year; and

(2) Have an increase from the previous year in the total number of handicapped children aged three through five years served under 34 CFR Part 300.

(b) Each State shall develop and implement procedures to estimate accurately the increase in the number of handicapped children aged three through five years who will be receiving special education and related services under 34 CFR Part 300 and 302 by the count dates for these programs for the next fiscal year.

(c) The procedures for making an estimation in paragraph (b) of this section must be based upon estimates from LEAs and IEUs, and other available data, of the number of additional handicapped children aged three through five years that LEAs and IEUs expect to be serving under 34 CFR Parts 300 and 302 on December 1 of the year following the most recent Part B child count.

(d) The State shall provide the estimates on forms provided by the Secretary no later than February 1 of the year in which the Secretary requires estimates.

(e) The State shall attach a copy of the procedures used to make the estimates under paragraph (c) of this section to the estimated count form.

(Authority: 20 U.S.C. 1419(a))

(Approved by the Bureau of Management and Budget under Control number 1820-0552)

§301.21 How are adjustments made if a State overestimates or underestimates the increase in preschool handicapped children served?

If the actual number of additional handicapped children aged three though five years counted as served on December 1 of the following year under 34 CFR Parts 300 and 302 differs from the estimate submitted by a State in fiscal year 1987, 1988, or 1989, the Secretary increases or decreases the State's grant for the next fiscal year based upon the difference in the number of additional handicapped children who were estimated to be served and the number actually served under 34 CFR Part 300.

(Authority: 20 U.S.C. 1419(a)(2))

Subpart D - How Does a State Make a Subgrant to an Applicant?

§301.30 How does a State distribute the grant money?

(a) A State shall distribute at least 75 percent of its grant to LEAs and IEUs to be used to provide additional education and related services to handicapped children aged three through five years.

(b) A State may use not more than 20 percent of the grant for –

(1) The planning and development of a statewide comprehensive service delivery system for handicapped children from birth through age five years; and

(2) The provision of direct and support services for handicapped children aged three through five years.

(c) A State may use not more than five percent of the grant for the costs of administering the grant.

(d) If a State provides services to preschool handicapped children because some or all LEAs and IEUs are unable or unwilling to provide appropriate programs, the SEA may use payments that would have been available to those LEAs and IEUs to provide special education and related services to handicapped children aged three through five years residing in the area served by those LEAs and IEUs.

(Authority: 20 U.S.C. 1414(d), 1419(c)(2))

§301.31 What is the amount of a subgrant to a local educational agency?

From the amount of funds available to LEAs and IEUs in the State, each LEA and IEU is entitled to the sum of –

(a) An amount that bears the same ratio to the maximum amount awarded to the State based on the previous child count as the number of handicapped children aged three though five years in that agency who were receiving special education and related services on the most recent Part B child count bears to the aggregate number of handicapped children aged three through five years receiving special education and related services on the most recent Part B child count in all LEAs and IEUs that are entitled to Preschool Grants funds; and

(b) An amount that bears the same ratio to the State's excess appropriation, if any, as the LEA's or IEU's estimated count of additional handicapped children aged three through five years who will be receiving special education and related services on the next Part B child count bears to the aggregate number of additional handicapped children aged three through five years who will be receiving special education and related services by the next Part B child count in all LEAs and IEUs that are entitled to Preschool Grant funds.

(Authority: 20 U.S.C. 1419(c)(3))

§301.32 How are adjustments made to a local educational agency's subgrant?

If the actual number of additional handicapped children aged three through five years served under 34 CF Part 300 in fiscal year 1987, 1988, or 1989 differs from the estimate submitted by an LEA or IEU for that fiscal year, the State shall increase or decrease the LEA's or IEU's grant in the next fiscal year based upon the number of preschool handicapped children who were actually served.

(Authority: 20 U.S.C. 1419(c)(3)(A),(B))

©1993, EDLAW,Inc.

children with disabilities aged three though five years in that agency who were receiving special education and related services on the most recent Part B child count bears to the aggregate number of children with disabilities aged three through five years receiving special education and related services on the most recent Part B child count in all LEAs and IEUs that are entitled to Preschool Grants funds; and

(b) An amount that bears the same ratio to the State's excess appropriation, if any, as the LEA's or IEU's estimated count of additional children with disabilities aged three through five years who will be receiving special education and related services on the next Part B child count bears to the aggregate number of additional children with disabilities aged three through five years who will be receiving special education and related services by the next Part B child count in all LEAs and IEUs that are entitled to Preschool Grant funds.

(Authority: 20 U.S.C. 1419(c)(3))

§301.32 How are adjustments made to a local educational agency's subgrant?

If the actual number of additional children with disabilities aged three through five years served under 34 CF Part 300 in fiscal year 1987, 1988, or 1989 differs from the estimate submitted by an LEA or IEU for that fiscal year, the State shall increase or decrease the LEA's or IEU's grant in the next fiscal year based upon the number of preschool children with disabilities who were actually served.

(Authority: 20 U.S.C. 1419(c)(3)(A),(B))

©1993, EDLAW,Inc.

Section I

APPENDIX C - IEPS

INDIVIDUALIZED EDUCATION PROGRAMS

§ 300.340 Definition.

As used in this part, the term "individualized education program" means a written statement for a handicapped child that is developed and implemented in accordance with §§ 300.341-300.349.

(20 U.S.C. 1401(19).)

§ 300.341 State educational agency responsibility.

(a) *Public agencies.* The State educational agency shall insure that each public agency develops and implements an individualized education program for each of its handicapped children.

(b) *Private schools and facilities.* The State educational agency shall insure that an individualized education program is developed and implemented for each handicapped child who:

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a parochial or other private school and receives special education or related services from a public agency.

(20 U.S.C. 1412 (4), (6); 1413(a)(4).)

Comment: This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare), which provide special education to a handicapped child either directly, by contract or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a handicapped child, that agency would be responsible for insuring that an individualized education program is developed for the child.

1. *Who is responsible for ensuring the development of IEPs for handicapped children served by a public agency other than an LEA?*

The answer will vary from State to State, depending upon State law, policy, or practice. In each State, however, the SEA is ultimately responsible for ensuring that each agency in the State is in compliance with the IEP requirements and the other provisions of the Act and regulations. (See § 300.600 regarding SEA responsibility for all education programs.)

The SEA must ensure that every handicapped child in the State has available a free appropriate public education (FAPE), regardless of which agency, State or local, is responsible for the child. While the SEA has flexibility in deciding the best means to meet this obligation (e.g., through interagency agreements), there can be no failure to provide FAPE due to jurisdictional disputes among agencies.

NOTE: Section 300.2(b) states that the requirements of the Act and regulations apply to all political subdivisions of the State that are involved in the education of handicapped children, including (1) the SEA, (2) LEAs, (3) other State agencies (such as Departments of Mental Health and Welfare, and State schools for the deaf or blind), and (4) State correctional facilities.

The following paragraphs outline (1) some of the SEA's responsibilities for developing policies or agreements under a variety of interagency situations, and (2) some of the responsibilities of an LEA when it initiates the placement of a handicapped child in a school or program operated by another State agency:

a. *SEA POLICIES OR INTERAGENCY AGREEMENTS.* The SEA, through its written policies or agreements, must ensure that IEPs are properly written and implemented for all handicapped children in the State. This applies to each interagency situation that exists in the State, including any of the following:

(1) When an LEA initiates the placement of a child in a school or program operated by another State agency (see "LEA-Initiated Placements" in paragraph "b", below); (2) when a State or local agency other than the SEA or LEA places a child in a residential facility or other program; (3) when parents initiate placements in public institutions; and (4) when the courts make placements in correctional facilities.

NOTE: This is not an exhaustive list. The SEA's policies must cover any other interagency situation that is applicable in the State, including placements that are made for both educational and for non-educational purposes.

Frequently, more than one agency is involved in developing or implementing a handicapped child's IEP (e.g., when the LEA remains responsible for the child, even though another public agency provides the special education and related services, or when there are shared cost arrangements). It is important that SEA policies or agreements define the role of each agency involved in the situations described above, in order to resolve any jurisdictional problems that could delay the provision of a free appropriate public education to a handicapped child. For example, if a child is placed in a residential facility, any one or all of the following agencies might be involved in the development and/or implementation of the child's IEP: The child's LEA, the SEA, another State agency, an institution or school under that agency, and the LEA where the institution is located.

NOTE: The SEA must also ensure that any agency involved in the education of a handicapped child is in compliance with the "least restrictive environment" provisions of the Act and regulations, and, specifically, with the requirement that each handicapped child's placement (1) be determined at least annually, (2) be based on the child's IEP, and (3) be as close as possible to the child's home (§ 300.552(a), *Placements.*)

b. *LEA-INITIATED PLACEMENTS.* When an LEA is responsible for the education of a handicapped child, the LEA is also responsible for developing the child's IEP. The LEA has this responsibility even if development of the IEP results in placement in a State-operated school or program.

NOTE: The IEP must be developed before the child is placed. See Question 5, below.) When placement in a State-operated school is necessary, the affected State agency or agencies must be involved by the LEA in the development of the IEP. (See response to Question 59, below, regarding participation of a private school representative at the IEP meeting.)

After the child enters the State school, meetings to review or revise the child's IEP could be conducted by either the LEA or the State school, depending upon State law, policy, or practice. However, both agencies should be involved in any decisions made about the child's IEP (either by attending the IEP meetings, or through correspondence or telephone calls). There must be a clear decision, based on State law, as to whether responsibility for the child's education is transferred to the State school or remains with the LEA, since this decision determines which agency is responsible for reviewing or revising the child's IEP.

2. *For a child placed out of State by a public agency, is the placing or receiving State responsible for the child's IEP?*

The "placing" State is responsible for developing the child's IEP and ensuring that it is implemented. The determination of the specific agency in the placing State that is responsible for the child's IEP would be based on State law, policy, or practice. However, as indicated in Question 1, above, the SEA in the placing State is responsible for ensuring that the child has available a free appropriate public education.

NOTE: The Department is considering the possibility of publishing a separate document on out-of-State placements. That paper would address the responsibilities of the placing and receiving States under both EHA-B and Section 504 of the Rehabilitation Act of 1973.

§ 300.342 When individualized education programs must be in effect.

(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.

(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 300.343.

(20 U.S.C. 1412 (2)(B), (4), (6); 1414(a)(5); Pub. L. 94-142, Sec. 8(c) (1975).)

Comment. **Under paragraph (b)(2), it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under § 300.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances which require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.**

3. *In requiring that an IEP be in effect before special education and related services are provided, what does "be in effect" mean?*

As used in the regulations, the term "be in effect" means that the IEP (1) has been developed properly (i.e., at a meeting(s) involving all of the participants specified in the Act (parent, teacher, agency representative, and, where appropriate, the child)); (2) is regarded by both the parents and agency as appropriate in terms of the child's needs, specified goals and objectives, and the services to be provided; and (3) will be implemented as written.

4. *How much of a delay is permissible between the time a handicapped child's IEP is finalized and when special education is provided?*

In general, no delay is permissible. It is expected that the special education and related services set out in a child's IEP will be provided by the agency beginning immediately after the IEP is finalized. The comment following § 300.342 identifies some exceptions ((1) when the meetings occur during the summer or other vacation period, or (2) when there are circumstances which require a short delay, such as working out transportation arrangements). However, unless otherwise specified in the IEP, the IEP services must be provided as soon as possible following the meeting.

Note: Section 300.346(d) requires that the IEP include the "projected dates for initiation of services."

5. *For a handicapped child receiving special education for the first time, when must an IEP be developed—before placement or after placement?*

An IEP must "be in effect *before* special education and related services are provided to a child." (§ 300.342(b)(1), emphasis added.) The appropriate placement for a given handicapped child cannot be determined until after decisions have been made about what the child's needs are and what will be provided. Since these decisions are made at the IEP meeting, it would not be permissible to first place the child and then develop the IEP. Therefore, the IEP must be developed before placement. The above requirement does not preclude temporarily placing an eligible handicapped child in a program as part of the evaluation process—before the IEP is finalized—to aid in determining the most appropriate placement for the child. It is essential that the temporary placement not become the final placement before the IEP is finalized. In order to ensure that this does not happen, the State might consider requiring LEAs to take the following actions:

a. Develop an "interim" IEP for the child, which sets out the specific conditions and timeliness for the trial placement. (See paragraph "c", below.)

b. Ensure that the parents agree to the interim placement before it is carried out, and that they are involved throughout the process of developing, reviewing, and revising the child's IEP.

c. Set a specific timeline (e.g., 30 days) for completing the evaluation and making judgments about the most appropriate placement for the child.

d. Conduct an IEP meeting at the end of the trial period in order to finalize the child's IEP.

Note: Once a handicapped child's IEP is in effect and the child is placed in a special education program, the teacher might develop detailed lesson plans or objectives *based* on the IEP. However, these lesson plans and objectives are not required to be a part of the IEP itself. (See Questions 37-43, below, regarding IEP goals and objectives.)

6. *If a handicapped child has been receiving special education in one LEA and moves to another community, must the new LEA hold an IEP meeting before the child is placed in a special education program?*

It would not be necessary for the new LEA to conduct an IEP meeting if:

(1) A copy of the child's current IEP is available; (2) the parents indicate that they are satisfied with the current IEP; and (3) the new LEA determines that the current IEP is appropriate and can be implemented as written.

If the child's current IEP is not available, or if either the LEA or the parent believes that it is not appropriate, an IEP meeting would have to be conducted. This meeting should take place within a short time after the child enrolls in the new LEA (normally, within one week).

Note: The child must be placed in a special education program immediately after the IEP is finalized. See Question 4, above.

If the LEA or the parents believe that additional information is needed (e.g., the school records from the former LEA) or that a new evaluation is necessary before a final placement decision can be made, it would be permissible to temporarily place the child in an interim program before the IEP is finalized. (See Question 5, above.)

§ 300.343 Meetings.

(a) *General*. Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

(b) *Handicapped children currently served*. If the public agency has determined that a handicapped child will receive special education during school year 1977-1978, a meeting must be held early enough to insure that an individualized education program is developed by October 1, 1977.

(c) *Other handicapped children*. For a handicapped child who is not included under paragraph (b) of this action, a meeting must be held within thirty calendar days of a determination that the child needs special education and related services.

(d) *Review*. Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

(20 U.S.C. 1412 (2) (B), (4), (6); 1414(a) (5).)

Comment. The dates on which agencies must have individualized education programs (IEPs) in effect are specified in § 300.342 (October 1, 1977, and the beginning of each school year thereafter). However, except for new handicapped children (i.e., those evaluated and determined to need special education after October 1, 1977), the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect by the dates in § 300.342, agencies could hold meetings at the end of the school year or during the summer preceding those dates. In meeting the October 1, 1977 timeline, meetings could be conducted up through the October 1 date. Thereafter, meetings may be held any time throurhout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review, and if appropriate revise each child's IEP. The timing of those meetings could be on the anniversary date of the last IEP meeting on the child, but this is left to the discretion of the agency.

7. *What is the purpose of the 30 day timeline in § 300.343(c)?*

The 30 day timeline in § 300.343(c) ensures that there will not be a significant delay between the time a child is evaluated and when the child begins to receive special education. Once it is determined—through the evaluation—that a child is handicapped, the public agency has *up to* 30 days to hold an IEP meeting.

NOTE: See Questions 4 and 5, above, regarding finalization of IEP and placement of the child.

8. *Must the agency hold a separate meeting to determine a child's eligibility for special education and related services, or can this step be combined with the IEP meeting?*

Paragraph (e) of § 300.532 (*Evaluation procedures*) provides that the evaluation of each handicapped child must be "made by a multidisciplinary team or group of persons * * *". The decisions regarding (1) whether the team members actually meet together, and (2) whether such meetings are separate from the IEP meeting, are matters that are left to the discretion of State or local agencies.

In practice, some agencies hold separate eligibility meetings with the multidisciplinary team before the IEP meeting.

NOTE: When separate meetings are conducted, placement decisions would be made at the IEP meeting. However, placement options could be discussed at the eligibility meeting.

Other agencies combine the two steps into one. If a combined meeting is conducted, the public agency must include the parents as participants at the meeting. (See § 300.345 for requirements on parent participation.)

NOTE: If, at a separate eligibility meeting, a decision is made that a child is *not* eligible for special education, the parents should be notified about the decision.

9. *Must IEPs be reviewed or revised at the beginning of each school year?*

No. The basic requirement in the regulations is that IEPs must *be in effect* at the beginning of each school year. Meetings must be conducted at least once each year to review and, if necessary, revise each handicapped child's IEP. However, the meetings may be held anytime during the year, including (1) at the end of the school year, (2) during the summer, before the new school year begins, or (3) on the anniversary date of the last IEP meeting on the child.

10. *How frequently must IEP meetings be held and how long should they be?*

Section 614(a)(5) of the Act provides that each public agency must hold meetings periodically, but not less than annually, to review each child's IEP and, if appropriate, revise its provisions. The legislative history of the Act makes it clear that there should be as many meetings a year as any one child may need. (121 Cong. Rec. S20428-29 (Nov. 19, 1975) (remarks of Senator Stafford))

There is no prescribed length for IEP meetings. In general, meetings (1) will be longer for initial placements and for children who require a variety of complex services, and (2) will be shorter for continuing placements and for children who require only a minimum amount of services. In any event, however, it is expected that agencies will allow sufficient time at the meetings to ensure meaningful parent participation.

11. *Who can initiate IEP meetings?*

IEP meetings are initiated and conducted at the descretion of the public agency. However, if the parents of a handicapped child believe that the child is not progressing satisfactorily or that there is a problem with the child's current IEP, it would be appropriate for the parents to request an IEP meeting. The public agency should grant any reasonable request for such a meeting.

NOTE: Under § 300.506(a), the parents or agency may initiate a due process hearing at any time regarding any matter related to the child's IEP.

If a child's teacher(s) feels that the child's placement or IEP services are not appropriate to the child, the teacher(s) should follow agency procedures with respect to (1) calling or meeting with the parents and/or (2) requesting the agency to hold another meeting to review the child's IEP.

12. *May IEP meetings be tape-recorded?*

The use of tape recorders at IEP meetings is not addressed by either the Act or the regulations. Although taping is clearly not required, it is permissible at the option of either the parents or the agency. However, if the recording is maintained by the agency, it is an "education record", within the meaning of the Family Educational Rights and Privacy Act ("FERPA"; 20 U.S.C. 1232g), and would, therefore, be subject to the confidentiality requirements of the regulations under both FERPA (34 CFR Part 99) and EHA-B (34 CFR 300.560-300.565).

§ 300.344 Participants in meetings.

(a) *General.* The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to § 300.345.

(4) The child, where appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel.* For a handicapped child who has been evaluated for the first time, the public agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5).)

Comment. 1. In deciding which teacher will participate in meetings on a child's individualized education program, the agency may wish to consider the following possibilities:

(a) For a handicapped child who is receiving special education, the "teacher" could be the child's special education teacher. If the child's handicap is a speech impairment, the "teacher" could be the speech-language pathologist.

(b) For a handicapped child who is being considered for placement in special education, the "teacher" could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

2. Either the teacher or the agency representative should be qualified in the area of the child's suspected disability.

3. For a child whose primary handicap is a speech impairment, the evaluation personnel participating under paragraph (b)(1) of this section would normally be the speech-language pathologist.

BEST COPY AVAILABLE

13. *Who can serve as the "representative of the public agency" at an IEP meeting?*

The "representative of the public agency" could be any member of the school staff, other than the child's teacher, who is "qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children." (Section 602(19) of the Act.) Thus, the agency representative could be (1) a qualified special education administrator, supervisor, or teacher (including a speech-language pathologist), or (2) a school principal or other administrator—if the person is qualified to provide, or supervise the provision of, special education.

Each State or local agency may determine which specific staff member will serve as the agency representative. However, the representative should be able to ensure that whatever services are set out in the IEP will actually be provided and that the IEP will not be vetoed at a higher administrative level within the agency. Thus, the person selected should have the authority to commit agency resources (i.e., to make decisions about the specific special education and related services that the agency will provide to a particular child).

For a handicapped child who requires only a limited amount of special education, the agency representative able to commit appropriate resources could be a special education teacher, or a speech-language pathologist, other than the child's teacher. For a child who requires extensive special education and related services, the agency representative might need to be a key administrator in the agency.

NOTE: IEP meetings for continuing placements could be more routine than those for initial placements, and, thus, might not require the participation of a key administrator.

14. *Who is the "representative of the public agency" if a handicapped child is served by a public agency other than the SEA or LEA?*

The answer depends on which agency is responsible, under State law, policy, or practice, for any one or all of the following:

(1) The child's education, (2) placing the child, and (3) providing (or paying for the provision of) special education and related services to the child.

In general, the agency representative at the IEP meeting would be a member of the agency or institution that is responsible for the child's education. For example, if a State agency (1) places a child in an institution, (2) is responsible under State law for the child's education, and (3) has a qualified special education staff at the institution, then a member of the institution's staff would be the agency representative at the IEP meetings.

Sometimes there is no special education staff at the institution, and the children are served by special education personnel from the LEA where the institution is located. In this situation, a member of the LEA staff would usually serve as the agency representative.

NOTE: In situations where the LEA places a child in an institution, paragraph "b" of the response to Question 1, above, would apply.

15. *For a handicapped child being considered for initial placement in special education, which teacher should attend the IEP meeting?*

The teacher could be either (1) a teacher qualified to provide special education in the child's area of suspected disability, or (2) the child's regular teacher. At the option of the agency, both teachers could attend. In any event, there should be at least one member of the school staff at the meeting (e.g., the agency representative or the teacher) who is qualified in the child's area of suspected disability.

NOTE: Sometimes more than one meeting is necessary in order to finalize a child's IEP. If, in this process, the special education teacher who will be working with the child is identified, it would be useful to have that teacher participate in the meeting with the parents and other members of the IEP team in finalizing the IEP. When this is not possible, the agency should ensure that the teacher is given a copy of the child's IEP as soon as possible after the IEP is finalized and before the teacher begins working with the child.

16. *If a handicapped child is enrolled in both regular and special education classes, which teacher should attend the IEP meeting?*

In general, the teacher at the IEP meeting should be the child's special education teacher. At the option of the agency or the parent, the child's regular teacher also might attend. If the regular teacher does not attend, the agency should either provide the regular teacher with a copy of the IEP or inform the regular teacher of its contents. Moreover, the agency should ensure that the special education teacher, or other appropriate support person, is able, where necessary, to consult with and be a resource to the child's regular teacher.

17. *If a handicapped child in high school attends several regular classes, must all of the child's regular teachers attend the IEP meeting?*

No. Only one teacher must attend. However, at the option of the LEA, additional teachers of the child may attend. The following points should be considered in making this decision:

a. Generally, the number of participants at IEP meetings should be small. Small meetings have several advantages over large ones. For example, they (1) allow for more open, active parent involvement, (2) are less costly, (3) are easier to arrange and conduct, and (4) are usually more productive.

NOTE: In an informal examination of IEPs from five States, Department staff found that, on the average, IEP meetings were attended by four persons.

b. While large meetings are generally inappropriate, there may be specific circumstances in which the participation of additional staff would be beneficial. When the participation of the regular teachers is considered by the agency or the parents to be beneficial to the child's success in school (e.g., in terms of the child's participation in the regular education program), it would be appropriate for them to attend the meeting.

c. Although the child's regular teachers would not routinely attend IEP meetings, they should either (1) be informed about the child's IEP by the special education teacher or agency representative, and/or (2) receive a copy of the IEP itself.

18. *If a child's primary handicap is a speech impairment, must the child's regular teacher attend the IEP meeting?*

No. A speech-language pathologist would usually serve as the child's "teacher" for purposes of the IEP meeting. The regular teacher could also attend at the option of the school.

19. *If a child is enrolled in a special education class because of a primary handicap, and also receives speech-language pathology services, must both specialists attend the IEP meeting?*

No. It is not required that both attend. The special education teacher would attend the meeting as the child's "teacher". The speech-language pathologist could either (1) participate in the meeting itself, or (2) provide a written recommendation concerning the nature, frequency, and amount of services to be provided to the child.

20. *When may representatives of teacher organizations attend IEP meetings?*

Under the Family Educational Rights and Privacy Act ("FERPA"; 20 U.S.C. 1232g) and implementing regulations (34 CFR Part 99), officials of teacher organizations may not attend IEP meetings at which personally identifiable information from the student's education records may be discussed—except with the prior written consent of the parents. (See 34 CFR 99.30(a)(1).)

In addition, EHA-B does not provide for the participation of representatives of teacher organizations at IEP meetings. The legislative history of the Act makes it clear that attendance at IEP meetings should be limited to those who have an intense interest in the child. (121 Cong. Rec. S10974 (June 18, 1975) (remarks of Sen. Randolph).) Since a representative of a teacher organization would be concerned with the interests of the teacher rather than the interests of the child, it would be inappropriate for such an official to attend an IEP meeting.

21. *When may a handicapped child attend an IEP meeting?*

Generally, a handicapped child should attend the IEP meeting whenever the parent decides that it is appropriate for the child to do so. Whenever possible, the agency and parents should discuss the appropriateness of the child's participation before a decision is made, in order to help the parents determine whether or not the child's attendance will be (1) helpful in developing the IEP and/or (2) directly beneficial to the child. The agency should inform the parents before each IEP meeting—as part of the "notice of meeting" required under § 300.345(b)—that they may invite their child to participate.

NOTE: The parents and agency should encourage older handicapped children (particularly those at the secondary school level) to participate in their IEP meetings.

22. *Do the parents of a handicapped student retain the right to attend the IEP meeting when the student reaches the age of majority?*

The Act is silent concerning any modification of the rights of a handicapped student's parents when the student reaches the age of majority. The Department is considering providing further guidance on this issue in a separate document.

23. *Must related services personnel attend IEP meetings?*

No. It is not required that they attend. However, if a handicapped child has an identified need for related services, it would be appropriate for the related services personnel to attend the meeting or otherwise be involved in developing the IEP. For example, when the child's evaluation indicates the need for a specific related service (e.g., physical therapy, occupational therapy, or counseling), the agency should ensure that a qualified provider of that service either (1) attends the IEP meeting, or (2) provides a written recommendation concerning the nature, frequency, and amount of service to be provided to the child.

NOTE: This written recommendation could be a part of the evaluation report.

24. *Are agencies required to use a case manager in the development of a handicapped child's IEP?*

No. However, some agencies have found it helpful to have a special educator or some other school staff member (e.g., a social worker, counselor, or psychologist) serve as coordinator or case manager of the IEP process for an individual child or for all handicapped children served by the agency. Examples of the kinds of activities which case managers might carry out are (1) coordinating the multidisciplinary evaluation; (2) collecting and synthesizing the evaluation reports and other relevant information about a child that might be needed at the IEP meeting; (3) communicating with the parents; and (4) participating in, or conducting, the IEP meeting itself.

25. *For a child with a suspected speech impairment, who must represent the evaluation team at the IEP meeting?*

No specific person must represent the evaluation team. However, a speech-language pathologist would normally be the most appropriate representative. For many children whose primary handicap is a speech impairment, there may be no other evaluation personnel involved. The comment following § 300.532 (*Evaluation procedures*) states:

> Children who have a speech impairment as their primary handicap may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and (2) where necessary, make referrals for additional assessments needed to make an appropriate placement decision.

§ 300.345 Parent participation.

(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls.

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the individualized education program.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5).)

Comment. The notice in paragraph (a) could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c), the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

26. *What is the role of the parents at an IEP meeting?*

The parents of a handicapped child are expected to be equal participants along with school personnel, in developing, reviewing, and revising the child's IEP. This is an active role in which the parents (1) participate in the discussion about the child's need for special education and related services, and (2) join with the other participants in deciding what services the agency will provide to the child.

NOTE: In some instances, parents might elect to bring another participant to the meeting, e.g., a friend or neighbor, someone outside of the agency who is familiar with applicable laws and with the child's needs, or a specialist who conducted an independent evaluation of the child.)

27. *What is the role of a surrogate parent at an IEP meeting?*

A surrogate parent is a person appointed to represent the interests of a handicapped child in the educational decision-making process when that child has no other parent representation. The surrogate has all of the rights and responsibilities of a parent under EHA-B. Thus, the surrogate parent is entitled to (1) participate in the child's IEP meeting, (2) see the child's education records, and (3) receive notice, grant consent, and invoke due process to resolve differences. (See § 300.514, *Surrogate parents.*)

28. *Must the public agency let the parents know who will be at the IEP meeting?*

Yes. In notifying parents about the meeting, the agency "must indicate the purpose, time, and location of the meeting, and *who will be in attendance.*" (§ 300.345(b), emphasis added.) Where possible, the agency should give the name and position of each person who will attend. In addition, the agency should inform the parents of their right to bring other participants to the meeting. (See Question 21, above, regarding participation of the child.) It is also appropriate for the agency to ask whether the parents intend to bring a participant to the meeting.

29. *Are parents required to sign IEPs?*

Parent signatures are not required by either the Act or regulations. However, having such signatures is considered by parents, advocates, and public agency personnel to be useful.

Note: A national survey conducted under contract with the Department indicates that, in practice, most IEPs are signed by parents.)

The following are some of the ways in which IEPs signed by parents and/or agency personnel might be used:

a. A signed IEP is one way to document who attended the meeting.

Note: This is useful for monitoring and compliance purposes.

If signatures are not used, the agency must document attendance in some other way.

b. An IEP signed by the parents is one way to indicate that the parents approved the child's special education program.

Note: If, after signing, the parents feel that a change is needed in the IEP, it would be appropriate for them to request another meeting. See Question 11, above.

c. An IEP signed by an agency representative provides the parents a signed record of the services that the agency has agreed to provide.

Note: Even if the school personnel do not sign, the agency still must provide, or ensure the provision of, the services called for in the IEP.

30. *If the parent signs the IEP, does the signature indicate consent for initial placement?*

The parent's signature on the IEP would satisfy the consent requirement concerning initial placement of the child (§ 300.504(b)(1)(ii)) only if the IEP includes a statement on initial placement which meets the definition of "consent" in § 300.500:

> "Consent" means that: (a) the parent has been fully informed of all information relevant to the activity for which consent is sought * * *
>
> (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and
>
> (c) The parent understands that the granting of consent is voluntary * * * and may be revoked at any time.

31. *Do parents have the right to a copy of their child's IEP?*

Yes. Section 300.345(f) states that "the public agency shall give the parent, on request, a copy of the individualized education program." In order that parents may know about this provision, it is recommended that they be informed about it at the IEP meeting and/or receive a copy of the IEP itself a reasonable time following the meeting.

Note: The National Committee for Citizens in Education reports that in a 1979 survey of approximately 2,500 parents of handicapped children in 46 States, nearly 60% indicated that a completed copy of the IEP had been made available for them to keep.

32. *Must parents be informed at the IEP meeting of their right to appeal?*

If the agency has already informed the parents of their right to appeal, as it is required to do under the prior notice provisions of the regulations (§§ 300.504–300.505), it would not be necessary for the agency to do so again at the IEP meeting.

- Section 300.504(a) of the regulations states that "written notice which meets the requirements under § 300.505 must be given to parents a reasonable time" before the public agency proposes or refuses "to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child."
- Section 300.505(a) states that the notice must include "(1) A full explanation of all procedural safeguards available to parents"

under the due process provisions of the regulations (§§ 300.500-300.589).

The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to jointly decide upon what the child's needs are, what will be provided, and what the anticipated outcomes may be. If, during the IEP meeting, parents and school staff are unable to reach agreement, the agency should remind the parents that they may seek to resolve their differences though the due process procedures under the Act.

NOTE: Section 300.506(a) states that "a parent or public educational agency may initiate a hearing on any matters described in § 300.504(a)(1) and (2)."

Every effort should be made to resolve differences between parents and school staff without resort to a due process hearing (i.e., through voluntary mediation or some other informal step). However, mediation or other informal procedures may not be used to deny or delay a parent's right to a due process hearing. (See § 300.506. *Impartial due process hearing.*)

33. *Does the IEP include ways for parents to check the progress of their children?*

In general, the answer is yes. The IEP document is a written record of decisions jointly made by parents and school personnel at the IEP meeting regarding a handicapped child's special education program. That record includes agreed upon items, such as goals and objectives, and the specific special education and related services to be provided to the child.

The goals and objectives in the IEP should be helpful to both parents and school personnel, in a general way, in checking on a child's progress in the special education program. (See Questions 37-43, below, regarding goals and objectives in the IEP.) However, since the IEP is not intended to include the specifics about a child's total educational program that are found in daily, weekly, or monthly instructional plans, parents will often need to obtain more specific, on-going information about the child's progress—through parent-teacher conferences, report cards and other reporting procedures ordinarily used by the agency.

34. *Must IEPs include specific "checkpoint intervals" for parents to confer with teachers and to revise or update their children's IEPs?*

No. A handicapped child's IEP is not required to include specific "checkpoint intervals" (i.e., meeting dates) for reviewing the child's progress. However, in individual situations, specific meeting dates could be designated in the IEP, if the parents and school presonnel believe that it would be helpful to do so.

Although meeting dates are not required to be set out in the IEP itself, there are specific provisions in the regulations and in this document regarding agency responsibilities in initiating IEP meetings, including the following:

(1) Public agencies must hold meetings periodically, but not less than annually, to review, and if appropriate, revise, each child's IEP (§ 300.343(d)); (2) there should be as many meetings a year as the child needs (see Question 10, above); and (3) agencies should grant any reasonable parental request for an IEP meeting (see Question 11, above).

In addition to the above provisions, it is expected that, through an agency's general reporting procedures for all children in school, there will be specific designated times for parents to review their children's progress (e.g., through periodic parent-teacher conferences, and/or the use of report cards, letters, or other reporting devices).

35. *If the parents and agency are unable to reach agreement at an IEP meeting, what steps should be followed until agreement is reached?*

As a general rule, the agency and parents would agree to an interim course of action for serving the child (i.e., in terms of placement and/or services) to be followed until the area of disagreement over the IEP is resolved. The manner in which this interim measure is developed and agreed to by both parties is left to the discretion of the individual State or local agency. However, if the parents and agency cannot agree on an interim measure, the child's last agreed upon IEP would remain in effect in the areas of disagreement until the disagreement is resolved. The following may be helpful to agencies when there are disagreements:

a. There may be instances where the parents and agency are in agreement about the basic IEP services (e.g., the child's placement and/or the special education services), but disagree about the provision of a particular related service (i.e., whether the service is needed and/or the amount to be provided). In such cases, it is recommended (1) that the IEP be implemented in all areas in which there is agreement, (2) that the document indicate the points of disagreement, and (3) that procedures be initiated to resolve the disagreement.

b. Sometimes the disagreement is with the placement or kind of special education to be provided (e.g., one party proposes a self-contained placement, and the other proposes resource room services). In such cases, the agency might, for example, carry out any one or all of the following steps:

(1) Remind the parents that they may resolve their differences through the due process procedures under EHA-B; (2) work

with the parents to develop an interim course of action (in terms of placement and/or services) which both parties can agree to until resolution is reached; and (3) recommend the use of mediation, or some other informal procedure for resolving the differences without going to a due process hearing. (See Question 32, above, regarding the right to appeal.)

c. If, because of the disagreement over the IEP, a hearing is initiated by either the parents or agency, the agency may not change the child's placement unless the parents and agency agree otherwise. (See § 300.513, *Child's status during proceedings.*) The following two examples are related to this requirement:

(1) A child in the regular fourth grade has been evaluated and found to be eligible for special education. The agency and parents agree that the child has a specific learning disability. However, one party proposes placement in a self-contained program, and the other proposes placement in a resource room. Agreement cannot be reached, and a due process hearing is initiated. Unless the parents and agency agree otherwise, the child would remain in the regular fourth grade until the issue is resolved.

On the other hand, since the child's need for special education is not in question, both parties might agree—as an interim measure—(1) to temporarily place the child in either one of the programs proposed at the meeting (self-contained program or resource room), or (2) to serve the child through some other temporary arrangement.

(2) A handicapped child is currently receiving special education under an existing IEP. A due process hearing has been initiated regarding an alternative special education placement for the child. Unless the parents and agency agree otherwise, the child would remain in the current placement. In this situation, the child's IEP could be revised, as necessary, and implemented in all of the areas agreed to by the parents and agency, while the area of disagreement (i.e., the child's placement) is being settled through due process.

NOTE: If the due process hearing concerns whether or not a particular service should continue to be provided under the IEP (e.g., physical therapy), that service *would* continue to be provided to the child under the IEP that was in effect at the time the hearing was initiated, (1) unless the parents and agency agree to a change in the services, or (2) until the issue is resolved.

§ 300.346 Content of individualized education program.

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational performance;

(b) A statement of annual goals, including short term instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The projected dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6), 1414(a)(5); Senate Report No. 94-168, p. 11 (1975).)

36. *What should be included in the statement of the child's present levels of educational performance?*

The statement of present levels of educational performance will be different for each handicapped child. Thus, determinations about the content of the statement for an individual child are matters that are left to the discretion of participants in the IEP meetings. However, the following are some points which should be taken into account in writing this part of the IEP.

a. The statement should accurately describe the effect of the child's handicap on the child's performance in any area of education that is affected, including (1) academic areas (reading, math, communication, etc.), and (2) non-academic areas (daily life activities, mobility, etc.).

NOTE: Labels such as "mentally retarded" or "deaf" may not be used as a substitute for the description of present levels of educational performance.)

b. The statement should be written in objective measurable terms, to the extent possible. Data from the child's evaluation would be a good source of such information. Test scores that are pertinent to the child's diagnosis might be included, where appropriate. However, the scores should be (1) self-explanatory (i.e., they can be interpreted by all participants without the use of test manuals or other aids), or (2) an explanation should be included. Whatever test results are used should reflect the impact of the handicap on the child's performance. Thus, raw scores would not usually be sufficient.

c. There should be a direct relationship between the present levels of educational performance and the other components of the IEP. Thus, if the statement describes a problem with the child's reading level and points to a deficiency in a specific reading skill, this problem should be addressed under both (1) goals and objectives, and (2) specific special education and related services to be provided to the child.

37. *Why are goals and objectives require in the IEP?*

The statutory requirements for including annual goals and short term objectives (Section 602(19)(B)), and for having at least an annual review of a handicapped child's IEP (Section 614(a)(5)), provide a mechanism for determining (1) whether the anticipated outcomes for the child are being met (i.e., whether the child is progressing in the special education program) and (2) whether the placement and services are appropriate to the child's special learning needs. In effect, these requirements provide a way for the child's teacher(s) and parents to be able to track the child's progress in special education. However, the goals and objectives in the IEP are not intended to be as specific as the goals and objectives that are normally found in daily, weekly, or monthly instructional plans.

38. *What are "annual goals" in an IEP?*

The annual goals in the IEP are statements which describe what a handicapped child can reasonably be expected to accomplish within a twelve month period in the child's special education program. As indicated under Question 36, above, there should be a direct relationship between the annual goals and the present levels of educational performance.

39. *What are "short term instructional objectives" in an IEP?*

"Short term instructional objectives" (also called "IEP objectives") are measurable, intermediate steps between a handicapped child's present levels of educational performance and the annual goals that are established for the child. The objectives are developed based on a logical breakdown of the major components of the annual goals, and can serve as milestones for measuring progress toward meeting the goals.

In some respects, IEP objectives are similar to objectives used in daily classroom instructional plans. For example, both kinds of objectives are used (1) to describe what a given child is expected to accomplish in a particular area within some specified time period, and (2) to determine the extent to which the child is progressing toward those accomplishments.

In other respects, objectives in IEPs are different from those used in instructional plans, primarily in the amount of detail they provide. IEP objectives provide general benchmarks for determining progress toward meeting the annual goals. These objectives should be projected to be accomplished over an extended period of time (e.g., an entire school quarter or semester). On the other hand, the objectives in classroom instructional plans deal with more specific outcomes that are to be accomplished on a daily, weekly, or monthly basis. Classroom instructional plans generally include details not required in an IEP, such as the specific methods, activities, and materials (e.g., use of flash cards) that will be used in accomplishing the objectives.

40. *Should the IEP goals and objectives focus only on special education and related services, or should they relate to the total education of the child?*

IEP goals and objectives are concerned primarily with meeting a handicapped child's need for special education and related services, and are not required to cover other areas of the child's education. Stated another way, the goals and objectives in the IEP should focus on offsetting or reducing the problems resulting from the child's handicap which interfere with learning and educational performance in school. For example, if a learning disabled child is functioning several grades below the child's indicated ability in reading and has a specific problem with word recognition, the IEP goals and objectives would be directed toward (1) closing the gap between the child's indicated ability and current level of functioning, and (2) helping the child increase the ability to use word attack skills effectively (or to find some other approach to increase independence in reading).

For a child with a mild speech impairment, the IEP objectives would focus on improving the child's communication skills, by either (1) correcting the impairment, or (2) minimizing its effect on the child's ability to communicate. On the other hand, the goals and objectives for a severely retarded child would be more comprehensive and cover more of the child's school program than if the child has only a mild handicap.

41. *Should there be a relationship between the goals and objectives in the IEP and those that are in instructional plans of special education personnel?*

Yes. There should be a direct relationship between the IEP goals and objectives for a given handicapped child and the goals and objectives that are in the special education instructional plans for the child. However, the IEP is not intended to be detailed enough to be used as an instructional plan. The IEP, through its goals and objectives, (1) sets the general direction to be taken by those who will implement the IEP, and (2) serves as the basis for developing a detailed instructional plan for the child.

NOTE: See Question 56, below, regarding the length of IEPs.

42. *When must IEP objectives be written—before placement or after placement?*

IEP objectives must be written before placement. Once a handicapped child is placed in a special education program, the teacher might develop lesson plans or more detailed objectives *based* on the IEP; however, such plans and objectives are not required to be a part of the IEP itself.

43. *Can short term instructional objectives be changed without initiating another IEP meeting?*

No. Section 300.343(a) provides that the agency "is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and *revising* a handicapped child's individualized education program" (emphasis added). Since a change in short term instructional objectives constitutes a revision of the child's IEP, the agency must (1) notify the parents of the proposed change (see § 300.504(a)(1)), and (2) initiate an IEP meeting. Note, however, that if the parents are unable or unwilling to attend such a meeting, their participation in the revision of the IEP objectives can be obtained through other means, including individual or conference telephone calls (see § 300.345(c)).

44. *Must the IEP include all special education and related services needed by the child or only those available from the public agency?*

Each public agency must provide a free appropriate public education to all handicapped children under its jurisdiction. Therefore, the IEP for a handicapped child must include all of the specific special education and related services needed by the child—as determined by the child's current evaluation. This means that the services must be listed in the IEP even if they are not directly available from the local agency, and must be provided by the agency through contract or other arrangements.

45. *Is the IEP a commitment to provide services—i.e., must a public agency provide all of the services listed in the IEP?*

Yes. Each handicapped child's IEP must include all services necessary to meet the child's identified special education and related services needs; and all services in the IEP must be provided in order for the agency to be in compliance with the Act.

46. *Must the public agency itself directly provide the services set out in the IEP?*

The public agency responsible for the education of a handicapped child could provide IEP services to the child (1) directly, through the agency's own staff resources, or (2) indirectly, by contracting with another public or private agency, or through other arrangements. In providing the services, the agency may use whatever State, local, Federal, and private sources of support are available for those purposes (see § 300.301(a)). However, the services must be at no cost to the parents, and resposibility for ensuring that the IEP services are provided remains with the public agency.

47. *Does the IEP include only special education and related services or does it describe the total education of the child?*

The IEP is required to include only those matters concerning the provision of special education and related services and the extent to which the child can participate in regular education programs. (NOTE: The regulations define "special education" as specially designed instruction to meet the unique needs of a handicapped child, and "related services" as those which are necessary to assist the child to benefit from special education.) (See §§ 300.14 and 300.13, respectively.)

For some handicapped children, the IEP will only address a very limited part of their education (e.g., for a speech impaired child, the IEP would generally be limited to the child's speech impairment). For other children (e.g., those who are profoundly retarded), the IEP might cover their total education. An IEP for a physically impaired child with no mental impairment might consist only of specially designed physical education. However, if the child also has a mental impairment, the IEP might cover most of the child's education

NOTE: The IEP is not intended to be detailed enough to be used as an instructional plan. See Question 41, above.

48. *If modifications are necessary for a handicapped child to participate in a regular education program, must they be included in the IEP?*

Yes. If modifications (supplementary aids and services) to the regular education program are necessary to ensure the child's participation in that program, those modifications must be described in the child's IEP (e.g., for a hearing impaired child, special seating arrangements or the provision of assignments in writing). This applies to any regular education program in which the student may participate, including physical education, art, music, and vocational education.

49. *When must physical education (PE) be described or referred to in the IEP?*

Section 300.307(a) provides that "physical education services, specially designed if necessary, must be made available to every handicapped child receiving a free appropriate public education." The following paragraphs (1) set out some of the different PE program arrangements for handicapped students, and (2) indicate whether, and to what extent, PE must be described or referred to in an IEP:

a. *Regular PE with non-handicapped students.* If a handicapped student can participate fully in the regular PE program without any special modifications to compensate for the student's handicap, it would not be necessary to describe or refer to PE in the IEP. On the other hand, if some modifications to the regular PE program are necessary for the student to be able to participate in that program, those modifications must be described in the IEP.

b. *Specially designed PE.* If a handicapped student needs a specially designed PE program, that program must be addressed in all applicable areas of the IEP (e.g., present levels of educational performance, goals and objectives, and services to be provided). However, these statements would not have to be presented in any more detail than the other special education services included in the student's IEP.

c. *PE in separate facilities.* If a handicapped student is educated in a separate facility, the PE program for that student must be described or referred to in the IEP. However, the kind and amount of information to be included in the IEP would depend on the physical-motor needs of the student and the type of PE program that is to be provided.

Thus, if a student is in a separate facility that has a standard PE program (e.g., a residential school for the deaf), and if it is determined—on the basis of the student's most recent evaluation—that the student is able to participate in that program without any modifications, then the IEP need only note such participation. On the other hand, if special modifications to the PE program are needed for the student to participate, those modifications must be described in the IEP. Moreover, if the student needs an individually designed PE program, that program must be addressed under all applicable parts of the IEP. (See paragraph "b", above.)

NOTE: The Department is considering the possibility of publishing a separate document on the PE requirement under the Act and regulations.

50. *If a handicapped student is to receive vocational education, must it be described or referred to in the student's IEP?*

The answer depends on the kind of vocational education program to be provided. If a handicapped student is able to participate in the regular vocational education program without any modifications to compensate for the student's handicap, it would not be necessary to include vocational education in the student's IEP. On the other hand, if modifications to the regular vocational education program are necessary in order for the student to participate in that program, those modifications must be included in the IEP. Moreover, if the student needs a specially designed vocational education program, then vocational education must be described in all applicable areas of the student's IEP (e.g., present levels of educational performance, goals and objectives, and specific services to be provided). However, these statements would not have to be presented in any more detail than the other special education services included in the IEP.

NOTE: Regulations under the Vocational Education Act provide that (1) certain funds available under that Act for vocational programs for handicapped persons must be used in a manner consistent with the State's plan under EHA-B, and (2) the five-year State Vocational Education Plan "shall describe how the program provided each handicapped child will be planned and coordinated in conformity with and as a part of the child's individualized education program as required by the Education of the Handicapped Act." See 34 CFR 400.141(f)(10), 400.182(f) (formerly 45 CFR 104.141(f)(10), 104.182(f)).

51. *Must the IEP specify the amount of services or may it simply list the services to be provided?*

The amount of services to be provided must be stated in the IEP, so that the level of the agency's commitment of resources will be clear to parents and other IEP team members. The amount of time to be committed to each of the various services to be provided must be (1) appropriate to that specific service, and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP.

Changes in the amount of services listed in the IEP cannot be made without holding another IEP meeting. However, as long as there is no change in the overall amount, some adjustments in scheduling the services should be possible (based on the professional judgment of the service provider) without holding another IEP meeting.

NOTE: The parents should be notified whenever this occurs.

52. *Must a handicapped child's IEP indicate the extent to which the child will be educated in the regular educational program?*

Yes. Section 300.346(c) provides that the IEP for each handicapped child must include a "statement of * * * the extent to which the child will be able to particpate in regular educational programs." One way of meeting this requirement is to indicate the percent of time the child will be spending in the regular education program with non-handicapped students. Another way is to list the specific regular education classes the child will be attending.

NOTE: If a severely handicapped child, for example, is expected to be in a special classroom setting most of the time, it is recommended that, in meeting the above requirement, the IEP include any non-curricular activities in which the child will be participating with non-handicapped students (e.g., lunch, assembly periods, club activities, and other special events).

53. *Can the anticipated duration of services be for more than twelve months?*

In general, the anticipated duration of services would be up to twelve months. There is a direct relationship between the anticipated duration of services and the other parts of the IEP (e.g., annual goals and short term objectives), and each part of the IEP would be addressed whenever there is a review of the child's program. If it is anticipated that the child will need a particular service for more than one year, the duration of that service could be projected beyond that time in the IEP. However, the duration of each service must be reconsidered whenever the IEP is reviewed.

54. *Must the evaluation procedures and schedules be included as a separate item in the IEP?*

No. The evaluation procedures and schedules need not be included as a separate item in the IEP, but they must be presented in a recognizable form and be clearly linked to the short term objectives.

NOTE: In many instances, these components are incorporated directly into the objectives.

OTHER QUESTIONS ABOUT THE CONTENT OF AN IEP

55. *Is it permissible for an agency to have the IEP completed when the IEP meeting begins?*

No. It is not permissible for an agency to present a completed IEP to parents for their approval before there has been a full discussion with the parents of (1) the child's need for special education and related services, and (2) what services the agency will provide to the child. Section 602(9) of the Act defines the IEP as a written statement *developed in any meeting* with the agency representative, the teacher, the parent, and, whenever appropriate, the child.

It would be appropriate for agency staff to come prepared with evaluation findings, statements of present levels of educational performance, and a recommmendation regarding annual goals, short term instructional objectives, and the kind of special education and related services to be provided. However, the agency must make it clear to the parents at the outset of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parents. The legislative history of Pub. L. 94-142 makes it clear that parents must be given the opportunity to be active participants in all major decisions affecting the education of their handicapped children. (See, e.g., S. Rep. No. 168, 94th Cong. 1st Sess. 13 (1975); S. Rep. No. 455 (Conference Report), 94th Cong. 1st Sess. 47-50 (1975).)

56. *Is there a prescribed format or length for an IEP?*

No. The format and length of an IEP are matters left to the discretion of State and local agencies. The IEP should be as long as necessary to adequately describe a child's program. However, as indicated in Question 41, above, the IEP is not intended to be a detailed instructional plan. The Federal IEP requirements can usually be met in a one to three page form.

NOTE: In a national survey conducted under contract with the Department, it was found that 47% of the IEPs reviewed were 3 pages or less in length.

57. *Is it permissible to consolidate the IEP with an individualized service plan developed under another Federal program?*

Yes. In instances where a handicapped child must have both an IEP and an individualized service plan under another Federal program, it may be possible to develop a single, consolidated document: *Provided*, That (1) it contains all of the information required in an IEP, and (2) all of the necessary parties participate in its development.

Examples of individualized service plans which might be consolidated with the IEP are: (1) The Individualized Care Plan (Title XIX of the Social Security Act (Medicaid)), (2) the Individualized Program Plan (Title XX of the Social Security Act (Social Services)), (3) the Individualized Service Plan (Title XVI of the Social Security Act (Supplemental Security Income)), and (4) the Individualized Written Rehabilitation Plan (Rehabilitation Act of 1973).

58. *What provisions on confidentiality of information apply to IEPs?*

IEPs are subject to the confidentiality provisions of both (1) EHA-B (Section 617(c) of the Act; §§ 300.560-300.576 of the regulations), and (2) the Family Educational Rights and Privacy Act ("FERPA", 20 U.S.C. 1232g). An IEP is an "education record" as that term is used in the FERPA and implementing regulations (34 CFR Part 99) and is, therefore, subject to the same protections as other education records relating to the student.

NOTE: Under Section 99.31(a) of the FERPA regulations, an educational agency may disclose personally identifiable information from the education records of a student without the written consent of the parents "if the disclosure is—(1) To other school officials, including teachers, within the educational institution or local educational agency who have been determined by the agency or institution to have legitimate educational interests * * *" in that information.

§ 300.347 Private school placements.

(a) *Developing individualized education programs.* (1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with § 300.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

(3) The public agency shall also develop an individualized educational program for each handicapped child who was placed in a private school or facility by the agency before the effective date of these regulations.

(b) *Reviewing and revising individualized education programs.* (1) After a handicapped child enters a private school or facility, any meetings to review and revise the child's individualized education program may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall insure that the parents and an agency representative:

(i) Are involved in any decision about the child's individualized education program; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's individualized education program, responsibility for compliance with this part remains with the public agency and the State educational agency.

(20 U.S.C. 1413(a)(4)(B).)

59. *If placement decisions are made at the time the IEP is developed, how can a private school representative attend the meeting?*

Generally, a child who requires placement in either a public or private residential school has already been receiving special education, and the parents and school personnel have often jointly been involved over a prolonged period of time in attempting to find the most appropriate placement for the child. At some point in this process (e.g., at a meeting where the child's current IEP is being reviewed), the possibility of residential school placement might be proposed—by either the parents or school personnel. It both agree, then the matter would be explored with the residential school. A subsequent meeting would then be conducted to finalize the IEP. At this meeting, the public agency must ensure that a representative of the residential school either (1) attends the meeting, or (2) participates through individual or conference telephone calls, or by other means.

§ 300.348 Handicapped children in parochial or other private schools.

If a handicapped child is enrolled in a parochial or other private school and receives special education or related services from a public agency, the public agency shall:

(a) Initiate and conduct meetings to develop, review, and revise an individualized education program for the child, in accordance with § 300.343; and

(b) Insure that a representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school, including individual or conference telephone calls.

(20 U.S.C. 1413(a)(4)(A).)

NOTE: The Department is considering publishing a separate document concerning the education of handicapped children placed in parochial or other private schools by their parents. Questions concerning IEPs for those children would be addressed in that document.

§ 300.349 Individualized education program—accountability.

Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

(20 U.S.C. 1412(2)(B); 1414(a) (5), (6); Cong. Rec. at H 7152 (daily ed., July 21, 1975).)

Comment. This section is intended to relieve concerns that the individualized education program constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the objectives and goals listed in the individualized education program. Further, the section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made.

60. *Is the IEP a performance contract?*

No. Section 300.349 makes it clear that the IEP is *not* a performance contract that imposes liability on a teacher or public agency if a handicapped child does not meet the IEP objectives. While the agency must provide special education and related services in accordance with each handicapped child's IEP, the Act does not require that the agency, the teacher, or other persons be held accountable if the child does not achieve the growth projected in the written statement.

[46 FR 5461, Jan. 19, 1981]

PART 301—PRESCHOOL GRANTS FOR HANDICAPPED CHILDREN

Subpart A—General

Sec.
301.1 What is the Preschool Grants for Handicapped Children Program?
301.2 What is eligible for an award?
301.3 What kinds of activities may be assisted?
301.4 What regulations apply?
301.5 What definitions apply?

Subpart B—How Does a State Apply for a Grant?

301.10 How does a State become eligible to receive a grant?
301.11 When does a State apply for a grant?
301.12 What are the sanctions if a State does not meet the statutory timeline for making a free appropriate public education available to all preschool children with handicaps?

Subpart C—How Does the Secretary Make a Grant to a State?

301.20 What requirements apply to estimating the number of handicapped children who will be served in order to receive funds from an excess appropriation?
301.21 How are adjustments made if a State overestimates or underestimates the increase in preschool handicapped children served?

Subpart D—How does a State Make a Subgrant to an Applicant?

301.30 How does a State distribute the grant money?
301.31 What is the amount of a subgrant to a local educational agency?
301.32 How are adjustments made to a local educational agency's subgrant?

AUTHORITY: 20 U.S.C. 1419, unless otherwise noted.

SOURCE: 54 FR 1646, Jan. 12, 1989, unless otherwise noted.

Subpart A—General

§ 301.1 What is the Preschool Grants for Handicapped Children Program?

The Preschool Grants for Handicapped Children program (Preschool

BEST COPY AVAILABLE

Section J

ARIZONA REVISED STATUTES RELATING TO SPECIAL EDUCATION

ARIZONA REVISED STATUTES
EXERPTS RELATIVE TO SPECIAL EDUCATION

15-101. Definitions

In this title, unless the context otherwise requires:

1. "Accommodation school" means a school which is operated through the county board of supervisors and the county school superintendent and which the county school superintendent administers to serve a military reservation or territory which is not included within the boundaries of a school district.
2. "Assessed valuation" means the valuation derived by applying the applicable percentage as provided in section 42-227 to the full cash value or limited property value, whichever is applicable, of the property.
3. "Charter school" means a public school established by contract with a district governing board, the state board of education or the state board for charter schools pursuant to article 8 of this chapter to provide learning that will improve pupil achievement.
4. "Competency" means a demonstrated ability in a skill at a specified performance level.
5. "Course" means organized subject matter in which instruction is offered within a given period of time and for which credit toward promotion, graduation or certification is usually given. A course consists of knowledge selected from a subject for instructional purposes in the schools.
6. "Course of study" means a list of required and optional subjects to be taught in the schools.
7. "Fiscal year" means the year beginning July 1 and ending June 30.
8. "Governing board" means a body organized for the government and management of the schools within a school district or a county school superintendent in the conduct of an accommodation school.
9. "Handicapped child" means a child with a disability as defined in section 15-761.
10. "Lease" means an agreement for conveyance and possession of real or personal property.
11. "Limited property value" means the value determined pursuant to section 42-201.02. Limited property value shall be used as the basis for assessing, fixing, determining and levying primary property taxes.
12. "Parent" means the natural or adoptive parent of a child or a person who has custody of a child.
13. "Person who has custody" means a parent or legal guardian of a child, a person to whom custody of the child has been given by order of a court or a person who stands in loco parentis to the child.
14. "Primary property taxes" means all ad valorem taxes except for secondary property taxes.
15. "Private school" means a nonpublic institution where instruction is imparted.
16. "School" means a public institution established by a school district or by a county school superintendent where instruction is imparted.
17. "School district" means a political subdivision of this state with geographic boundaries organized for the purpose of the administration, support and maintenance of the public schools or an accommodation school.
18. "Secondary property taxes" means ad valorem taxes used to pay the principal of and the interest and redemption charges on any bonded indebtedness or other lawful long-term obligation issued or incurred for a specific purpose by a school district or a community college district and amounts levied pursuant to an election to exceed a budget, expenditure or tax limitation.
19. "Subject" means a division or field of organized knowledge, such as English or mathematics, or a selection from an organized body of knowledge for a course or teaching unit, such as the English novel or elementary algebra.

15-181. Charter schools; purpose; scope

A. Charter schools may be established pursuant to this article to provide a learning environment that will improve pupil achievement. Charter schools provide additional academic choices for parents and pupils. Charter schools may consist of new schools or all or any portion of an existing school.

B. Charter schools shall comply with all provisions of this article in order to receive state funding as prescribed in section 15-185.

15-183. Charter schools; application; requirements; immunity; exemptions; renewal of application; reprisal

A.An applicant seeking to establish a charter school shall submit a written application to a proposed sponsor as prescribed in subsection C of this section. The application may include a mission statement for the charter school, a description of the charter school's organizational structure and the governing body, a financial plan for the first three years of operation of the charter school, a description of the charter school's hiring policy, the name of the charter school's applicant or applicants and requested sponsor, a description of the charter school's facility and the location of the school, a description of the grades being served and an outline of criteria designed to measure the effectiveness of the school.

B. The sponsor of a charter school may contract with a public body, private person or private organization for the purpose of establishing a charter school pursuant to this article.

C. The sponsor of a charter school may be either a school district governing board, the state board of education or the state board for charter schools, subject to the following requirements:

1. An applicant for a charter school may submit its application to a school district governing board, which shall either accept or reject sponsorship of the charter school within ninety days. An applicant may submit a revised application for reconsideration by the governing board. If the governing board rejects the application, the governing board shall notify the applicant in writing of the reasons for the rejection. The applicant may request, and the governing board may provide, technical assistance to improve the application.

2. The applicant may submit the application to the state board of education or the state board for charter schools. The state board of education or the state board for charter schools may approve the application if the application meets the requirements of this article and may approve the charter if the proposed sponsor determines, within its sole discretion, that the applicant is sufficiently qualified to operate a charter school. The state board of education or the state board for charter schools may each approve up to twenty-five charter schools each fiscal year. If the state board of education or the state board for charter schools rejects the preliminary application, the state board of education or the state board for charter schools shall notify the applicant in writing of the reasons for the rejection and of suggestions for improving the application. An applicant may submit a revised application for reconsideration by the state board of education or the state board for charter schools. The applicant may request, and the state board of education or the state board for charter schools may provide, technical assistance to improve the application.

3. Fingerprint checks for applicants of a charter school shall be conducted pursuant to section 41-1750, subsection G, prior to the issuance of a charter.

4. All noncertificated personnel shall be fingerprint checked pursuant to section 15-512.

D. A district governing board has no legal authority over or responsibility for a charter school sponsored by the state board of education or the state board for charter schools.

E. The charter of a charter school shall ensure the following:

1. Compliance with federal, state and local rules, regulations and statutes relating to health, safety, civil rights and insurance. The department of education shall publish a list of relevant rules, regulations and statutes to notify charter schools of their responsibilities under this paragraph.

2. That it is nonsectarian in its programs, admission policies and employment practices and all other operations.

3. That it provides a comprehensive program of instruction for at least a kindergarten program or any grade between grades one and twelve, except that a school may offer this curriculum with an emphasis on a specific learning philosophy or style or certain subject areas such as mathematics, science, fine arts, performance arts or foreign language.

4. That it designs a method to measure pupil progress toward the pupil outcomes adopted by the state board of education pursuant to section 15-741.01 including participation in the essential skills tests

and the nationally standardized norm-referenced achievement test as designated by the state board and the completion and distribution of an annual report card as prescribed in chapter 7, article 3 of this title.

5. That, except as provided in this article and in its charter, it is exempt from all statutes and rules relating to schools, governing boards and school districts.

6. That it is subject to the same financial requirements as a school district including the uniform system of financial records as prescribed in chapter 2, article 4 of this title, procurement rules as prescribed in section 15-213 and audit requirements. A school's charter may include exceptions to the requirements of this paragraph that are necessary as determined by the district governing board, the state board of education or the state board for charter schools. The department of education or the office of the auditor general may conduct financial, program or compliance audits.

7. Compliance with all federal and state laws relating to the education of children with disabilities in the same manner as a school district.

8. That it provides for a governing body for the charter school that is responsible for the policy and operational decisions of the charter school.

F. The charter of a charter school shall include a description of the charter school's personnel policies, personnel qualifications and method of school governance and the specific role and duties of the sponsor of the charter school.

G. The charter of a charter school may be amended at the request of the governing body of the charter school and on the approval of the sponsor.

H. Charter schools may contract, sue and be sued.

I. An approved plan to establish a charter school is effective for five years from the first day of operation. At the conclusion of the first four years of operation, the charter school may apply for renewal. The sponsor may deny the request for renewal if, in its judgment, the charter school has failed to complete the obligations of the application or has failed to comply with this article. A sponsor shall give written notice of its intent not to renew the charter school's request for renewal to the charter school at least twelve months before the expiration of the approved plan to allow the charter school an opportunity to apply to another sponsor to transfer the operation of the charter school. If the operation of the charter school is transferred to another sponsor, the five year period shall be repeated. A sponsor may revoke a charter at any time if the charter school breaches one or more provisions of its charter.

J. After renewal of the charter at the end of the five year period described in subsection I of this section, the charter may be renewed for successive periods of seven years if the charter school and its sponsor deem that the school is in compliance with its own charter and the provisions of this article.

K. A charter school that is sponsored by the state board of education or the state board for charter schools may not be located on the property of a school district unless the district governing board grants this authority.

L. A governing board or a school district employee who has control over personnel actions shall not take unlawful reprisal against another employee of the school district because the employee is directly or indirectly involved in an application to establish a charter school. A governing board or a school district employee shall not take unlawful reprisal against an educational program of the school or the school district because an application to establish a charter school proposes the conversion of all or a portion of the educational program to a charter school. As used in this subsection, "unlawful reprisal" means an action that is taken by a governing board or a school district employee as a direct result of a lawful application to establish a charter school and that is adverse to another employee or an education program and:

1. With respect to a school district employee, results in one or more of the following:

(a) Disciplinary or corrective action.

(b) Detail, transfer or reassignment.

(c) Suspension, demotion or dismissal.

(d) An unfavorable performance evaluation.

(e) A reduction in pay, benefits or awards.

(f) Elimination of the employee's position without a reduction in force by reason of lack of monies or work.

(g) Other significant changes in duties or responsibilities that are inconsistent with the employee's salary or employment classification.

2. With respect to an educational program, results in one or more of the following:
  (a) Suspension or termination of the program.
  (b) Transfer or reassignment of the program to a less favorable department.
  (c) Relocation of the program to a less favorable site within the school or school district.
  (d) Significant reduction or termination of funding for the program.

M. Charter schools do not have the authority to acquire property by eminent domain.

N. A school district governing board and its agents and employees are not liable for any acts or omissions of a charter school that is sponsored by the school district, including acts or omissions relating to the application submitted by the charter school, the charter of the charter school, the operation of the charter school and the performance of the charter school.

O. A sponsor other than a school district governing board, including members, officers and employees of the sponsor, are immune from personal liability for all acts done and actions taken in good faith within the scope of their authority during duly constituted regular and special meetings.

P. The sponsor of a charter school shall establish procedures to conduct administrative hearings upon determination by the sponsor that grounds exist to revoke a charter. Procedures for administrative hearings shall be similar to procedures prescribed for adjudicative proceedings in title 41, chapter 6, article 6. Final decisions of the state board of education and the state board for charter schools from hearings conducted pursuant to this subsection are subject to judicial review pursuant to title 12, chapter 7, article 6.

15-184. Charter schools; admission requirements

A. A charter school shall enroll all eligible pupils who submit a timely application, unless the number of applications exceeds the capacity of a program, class, grade level or building. A charter school that is sponsored by a school district governing board shall give enrollment preference to eligible pupils who reside within the boundaries of the school district where the charter school is physically located. If capacity is insufficient to enroll all pupils who submit a timely application, the charter school shall select pupils through an equitable selection process such as a lottery.

B. Except as provided in subsection C, a charter school shall not limit admission based on ethnicity, national origin, gender, income level, disabling condition, proficiency in the English language or athletic ability.

C. A charter school may limit admission to pupils within a given age group or grade level.

D. A charter school shall admit pupils who reside in the attendance area of a school or who reside in a school district that is under a court order of desegregation or that is a party to an agreement with the United States department of education office for civil rights directed toward remediating alleged or proven racial discrimination unless notice is received from the resident school that the admission would violate the court order or agreement. If a charter school admits a pupil after notice is received that the admission would constitute such a violation, the charter school is not allowed to include in its student count the pupils wrongfully admitted.

15-761. Definitions

In this article, unless the context otherwise requires:

1. "Autism" means a developmental disability that significantly affects verbal and nonverbal communication and social interaction, that is generally evident before the age of three and that adversely affects educational performance. Characteristics include irregularities and impairments in communication, engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines and unusual responses to sensory experiences. Autism does not include children with characteristics of emotional disability as defined in this section.

2. "Child with a disability" means a child who is at least three but less than twenty-two years of age, who has been evaluated pursuant to section 15-766 and found to have at least one of the following disabilities and who, because of the disability, needs special education and related services:

(a) Autism.
(b) Emotional disability.
(c) Hearing impairment.
(d) Other health impairments.
(e) Specific learning disability.
(f) Mild, moderate or severe mental retardation.
(g) Multiple disabilities.
(h) Multiple disabilities with severe sensory impairment.
(i) Orthopedic impairment.
(j) Preschool moderate delay.
(k) Preschool severe delay.
(l) Preschool speech/language delay.
(m) Speech/language impairment.
(n) Traumatic brain injury.
(o) Visual impairment.

3. "Educational disadvantage" means a condition which has limited a child's opportunity for educational experience resulting in a child, who does not have a disability as defined in this section, achieving less than a normal level of learning development.

4. "Eligibility for special education" means the pupil must have one of the disabilities contained in paragraph 2 of this section and must also require special education services in order to benefit from an educational program.

5. "Emotional disability":

(a) Means a condition whereby a child exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affects the child's performance in the educational environment:

(i) An inability to learn which cannot be explained by intellectual, sensory or health factors.

(ii) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(iii) Inappropriate types of behavior or feelings under normal circumstances.

(iv) A general pervasive mood of unhappiness or depression.

(v) A tendency to develop physical symptoms or fears associated with personal or school problems.

(b) Includes children who are schizophrenic but does not include children who are socially maladjusted unless they are also determined to have an emotional disability as determined by evaluation as provided in section 15-766.

6. "Exceptional child" means a gifted child or a child with a disability.

7. "Gifted child" means a child who is of lawful school age, who due to superior intellect or advanced learning ability, or both, is not afforded an opportunity for otherwise attainable progress and development in regular classroom instruction and who needs special instruction or special ancillary services, or both, to achieve at levels commensurate with his intellect and ability.

8. "Hearing impairment" means a hearing impairment, as determined by evaluation pursuant to section 15-766, which interferes with the child's performance in the educational environment and requires the provision of special education and related services.

9. "Home school district" means the school district in which the person resides who has legal custody of the child, as provided in section 15-824, subsection B. If the child is a ward of the state and a specific person does not have legal custody of the child, the home school district is the district that the child last attended or, if the child has not previously attended a public school in this state, the school district within which the child currently resides.

10. "Individualized education program" means a written statement for providing special education services to a child with a disability that includes the pupil's present levels of educational performance, the annual goals and the short-term measurable objectives for evaluating progress toward those goals and the specific special education and related services to be provided.

11. "Individualized education program team" means a team of persons who are knowledgeable about the child, including the parent, and whose task is to write an appropriate educational program for the child, based on the evaluation results.

12. "Mental retardation" means a significant impairment of general intellectual functioning that exists concurrently with deficits in adaptive behavior and that adversely affects the child's performance in the educational environment.

13. "Mild mental retardation" means performance on standard measures of intellectual and adaptive behavior between two and three standard deviations below the mean for children of the same age.

14. "Moderate mental retardation" means performance on standard measures of intellectual and adaptive behavior between three and four standard deviations below the mean for children of the same age.

15. "Multidisciplinary evaluation team" means a team of persons, including at least one teacher or other specialist with knowledge in the area of the suspected disability, that determines whether a child is eligible for special education based on evaluation results.

16. "Multiple disabilities" means learning and developmental problems resulting from multiple disabilities as determined by evaluation pursuant to section 15-766 that cannot be provided for adequately in a program designed to meet the needs of children with less complex disabilities. Multiple disabilities include any of the following conditions that require the provision of special education and related services:

(a) Two or more of the following conditions:
(i) Hearing impairment.
(ii) Orthopedic impairment.
(iii) Moderate mental retardation.
(iv) Visual impairment.

(b) A child with a disability listed in subdivision (a) of this paragraph existing concurrently with a condition of mild mental retardation, emotional disability or specific learning disability.

17. "Multiple disabilities with severe sensory impairment" means multiple disabilities that include at least one of the following:

(a) Severe visual impairment or severe hearing impairment in combination with another severe disability.

(b) Severe visual impairment and severe hearing impairment.

18. "Orthopedic impairment" means one or more severe orthopedic impairments and includes those that are caused by congenital anomaly, disease and other causes, such as amputation or cerebral palsy, and that adversely affect a child's performance in the educational environment.

19. "Other health impairments" means limited strength, vitality or alertness due to chronic or acute health problems which adversely affect a pupil's educational performance.

20. "Out-of-home care" means the placement of a child with a disability outside of the home environment and includes twenty-four hour residential care, group care or foster care on either a full-time or part-time basis.

21. "Parent" means the natural or adoptive parent of a child, the legal guardian of a child, a relative with whom a child resides and who is acting as the parent of that child or a surrogate parent who has been appointed for a child pursuant to section 15-763.01.

22. "Preschool child" means a child who is at least three years of age but who has not reached the required age for kindergarten, subject to section 15-771, subsection F.

23. "Preschool moderate delay" means performance by a preschool child on a norm-referenced test that measures at least one and one-half, but not more than three, standard deviations below the mean for children of the same chronological age in two or more of the following areas:

(a) Cognitive development.
(b) Physical development.
(c) Communication development.
(d) Social or emotional development.
(e) Adaptive development.

The results of the norm-referenced measure must be corroborated by information from a comprehensive developmental assessment and from parental input, if available, as measured by a judgment based assessment or survey. If there is a discrepancy between the measures, the evaluation team shall determine eligibility based on a preponderance of the information presented.

24. "Preschool severe delay" means performance by a preschool child on a norm-referenced test that measures more than three standard deviations below the mean for children of the same chronological age in one or more of the following areas:

(a) Cognitive development.
(b) Physical development.
(c) Communication development.
(d) Social or emotional development.
(e) Adaptive development.

The results of the norm-referenced measure must be corroborated by information from a comprehensive developmental assessment and from parental input, if available, as measured by a judgment based assessment or survey. If there is a discrepancy between the measures, the evaluation team shall determine eligibility based on a preponderance of the information presented.

25. "Preschool speech/language delay" means performance by a preschool child on a norm-referenced language test that measures at least one and one-half standard deviations below the mean for children of the same chronological age or whose speech, out of context, is unintelligible to a listener who is unfamiliar with the child. Eligibility under this paragraph is appropriate only if a comprehensive developmental assessment or norm-referenced assessment and parental input indicate that the child is not eligible for services under another preschool category. The evaluation team shall determine eligibility based on a preponderance of the information presented.

26. "Prior written notice" means notice that includes a description of the action proposed or refused by the school, an explanation of why the school proposes or refuses to take the action, a description of any options the school considered and the reasons why those options were rejected, a description of each evaluation procedure, test, record or report the school used as a basis for the proposal or refusal, a description of any other factors that were relevant to the school's proposal or refusal and a full explanation of all of the procedural safeguards available to the parent.

27. "Related services" means those supportive services that are required to assist a child with a disability who is eligible to receive special education services in order for the child to benefit from special education.

28. "Residential special education placement" means the placement of a child with a disability in a public or private residential program, as provided in section 15-765, subsection G, in order to provide necessary special education and related services as specified in the child's individualized education program.

29. "Severe mental retardation" means performance on standard measures of intellectual and adaptive behavior measures at least four standard deviations below the mean for children of the same age.

30. "Special education" means the adjustment of the environmental factors, modification of the course of study and adaptation of teaching methods, materials and techniques to provide educationally for those children who are gifted or disabled to such an extent that they need special education in order to receive educational benefit. Difficulty in writing, speaking or understanding the English language due to an environmental background wherein a language other than English is spoken primarily or exclusively shall not be considered a disability that requires special education.

31. "Special education referral" means a written request for an evaluation to determine whether a pupil is eligible for special education services that, for referrals not initiated by a parent, includes documentation of appropriate efforts to educate the pupil in the regular education program.

32. "Specific learning disability" means a specific learning disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations. The term includes such conditions as perceptual disabilities, minimal brain dysfunction, dyslexia and aphasia. The term does not include learning problems which are primarily the result of visual, hearing, motor or emotional disabilities, of mental retardation or of environmental, cultural or economic disadvantage.

33. "Speech/language impairment" means a communication disorder such as stuttering, impaired articulation, severe disorders of syntax, semantics or vocabulary, or functional language skills, or a voice

impairment, as determined by evaluation pursuant to section 15-766, to the extent that it calls attention to itself, interferes with communication or causes a child to be maladjusted.

34. "State placing agency" has the same meaning as prescribed in section 15-1181.

35. "Surrogate parent" means a person who has been appointed by the court pursuant to section 15-763.01 in order to represent a child in decisions regarding special education.

36. "Traumatic brain injury" means an acquired injury to the brain that is caused by an external physical force and that results in total or partial functional disability or psychosocial impairment, or both, that adversely affects educational performance. The term applies to open or closed head injuries resulting in mild, moderate or severe impairments in one or more areas, including cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem solving, sensory, perceptual and motor abilities, psychosocial behavior, physical functions, information processing and speech. The term does not include brain injuries that are congenital or degenerative or brain injuries induced by birth trauma.

37. "Visual impairment" means a visual impairment, as determined by evaluation pursuant to section 15-766, that interferes with the child's performance in the educational environment and that requires the provision of special education and related services.

15-762. Division of special education

The division of special education as provided in chapter 2, article 2 of this title shall carry out the provisions of this article subject to the superintendent of public instruction.

15-763. Plan for providing special education

All school districts shall develop a district plan for providing special education to all handicapped children within the district and submit it to the state board of education for approval. All handicapped children shall receive special education programming commensurate with their abilities and needs.

15-763.01. Surrogate parent; appointment

A. A petition for the appointment of a surrogate parent for a handicapped child shall be made to a court of competent jurisdiction if any of the following conditions have been met:

1. No parent can be identified.

2. A public agency cannot determine the whereabouts of a parent, after having made three documented and reasonable attempts.

3. The child is a ward of the state.

B. In order for a person to be eligible to receive an appointment as a surrogate parent for a handicapped child all of the following must be true:

1. The person shall be determined by the court to possess knowledge and skills that will ensure adequate representation of the child.

2. The person may not be an employee of a state agency if that agency is involved in the education or care of the child.

3. The person may not have any interests that would conflict with the best interests of the child.

C. A foster parent may petition the court to receive an appointment as a surrogate parent for a handicapped child. The court is responsible for determining whether a particular individual is able to act as a foster parent and also represent the best interest of the child as a surrogate parent.

D. A person who is appointed as a surrogate parent for a handicapped child shall not be deemed to be an employee of the state solely as a result of serving as a surrogate parent and receiving compensation for that service.

15-764. Powers of the school district governing board or county school superintendent

A. The governing board of each school district or the county school superintendent shall:

1. Provide special education and related services for all children with disabilities and make such programs and services available to all eligible children with disabilities who are at least three but less than twenty-two years of age.

2. Employ supportive special personnel, which may include a director of special education, for the operation of special school programs and services for exceptional children.

3. To the extent appropriate, educate children with disabilities in the regular education classes. Special classes, separate schooling or other removal of children with disabilities from the regular educational environment shall occur only if, and to the extent that, the nature or severity of the disability is such that education in regular classes, even with the use of supplementary aids and services, cannot be accomplished satisfactorily.

4. Provide necessary specialized transportation in connection with any educational program, class or service as required by the pupil's individualized education program.

5. Establish policy with regard to allowable pupil-teacher ratios and pupil-staff ratios within the school district or county for provision of special education services.

B. The special education programs and services established pursuant to this section and section 15-765 shall be conducted only in a school facility which houses regular education classes or in other facilities approved by the division of special education.

C. The governing board of each school district shall provide special education to gifted pupils identified as provided in section 15-770. Special education for gifted pupils shall only include expanding academic course offerings and supplemental services as may be required to provide an educational program which is commensurate with the academic abilities and potentials of the gifted pupil.

D. The governing board may modify the course of study and adapt teaching methods, materials and techniques to provide educationally for those pupils who are gifted and possess superior intellect or advanced learning ability, or both, but may have an educational disadvantage resulting from a disability or a difficulty in writing, speaking or understanding the English language due to an environmental background wherein a language other than English is primarily or exclusively spoken. Programs and services provided for gifted pupils as provided in this subsection may not be separate from programs provided for other gifted pupils, and may not be provided in facilities separate from the facilities used for other gifted pupils. Identification of gifted pupils as provided in this subsection shall be based on tests or subtests that are demonstrated to be effective with special populations including those with a disability or difficulty with the English language.

E. The governing body of each school district, county or agency involved in intergovernmental agreements may:

1. In cooperation with another school district or districts, establish special education programs for exceptional children. When two or more governing bodies determine to carry out by joint agreement the duties in regard to the special education programs for exceptional children, the governing bodies shall, in accordance with state law and the rules of the division of special education, establish a written agreement for the provision of services. In such agreements, one governing body of each school district, agency involved in intergovernmental agreements or the county shall administer the program in accordance with the contract agreement between the school districts. Tuition students may be included in the agreement. The agreement may also include lease-purchase of facilities for the special education programs for exceptional children.

2. Establish work-experience programs in accordance with rules of the division of special education. The work-experience programs shall consist of classroom instruction, evaluation, training and part-time employment. The evaluation, training and part-time employment may take place on or off the school campus, in or out of the school district, but must be under supervision of certified school personnel. Students enrolled in the work-experience program shall be at least sixteen years of age. Time in a work-experience program shall be counted as attendance at school to qualify for appropriations provided by section 15-769. All work-experience programs must have the approval of the division of special education.

F. The county school superintendent may, upon approval of the division of special education, establish special education programs in the county accommodation schools under the jurisdiction of the superintendent or may cooperate with other school districts by agreement to provide such services for such special programs in accordance with the rules of the division of special education. At the beginning of each school year the county school superintendent shall present an estimate of the current year's accommodation school exceptional programs tuition cost to each school district that has signed an agreement to use the services of the accommodation school. The tuition shall be the estimated per capita cost based on the number of pupils that each school district has estimated will enroll in the program, and the school district shall pay the tuition quarterly in advance on July 1, October 1, January 1 and April1. Increases in enrollment during the school year over the school district's estimate of July 1 shall cause the tuition charges to be adjusted accordingly. In the event of overpayment by the school district of residence, the necessary adjustment shall be made at the close of the school year.

15-765. Special education in rehabilitation, corrective or other state and county supported institutions, facilities or homes .

A.For the purposes of this section and section 15-764, children with disabilities who are being provided with special education in rehabilitation, corrective or other state and county supported institutions or facilities are the responsibility of that institution or facility, including children with disabilities who are not enrolled in a residential program and who are being furnished with daily transportation. Special education programs at the institution or facility shall conform to the conditions and standards prescribed by the director of the division of special education.

B. Notwithstanding the provisions of subsection A of this section, the department of economic security or the department of health services may request on behalf of a school-age child with a disability residing in a residential facility or foster home operated or supported by the department of economic security or the department of health services that the school district in which the facility or home is located enroll the school-age child in the district, subject to section 15-825. The school district shall, upon the request by the department of economic security or the department of health services, enroll the child and provide any necessary special education and related services, subject to section 15-766. A school district in which a child with a disability is enrolled shall coordinate the development of an individualized education program with the development of an individual program or treatment plan. The provision of special education and related services to a child with a disability may be subject to the provisions of subsection D of this section.

C. Before any placement is made in facilities described in this section, the school district of residence shall insure that a full continuum of alternative placements is available to meet the needs of children with disabilities and that the proposed placement is the least restrictive environment in which appropriate education services can be provided to the child.

D. A school district or county school superintendent may contract with, and make payments to, other public or private schools, institutions and agencies approved by the division of special education, within or without the school district or county, for the education of and provision of services to children with disabilities if the provisions of section 15-766 and the conditions and standards prescribed by the division of special education have been met and if unable to provide satisfactory education and services through its own facilities and personnel in accordance with the rules prescribed by the state board of education. No school district may contract or make payments under the authority of this section or section 15-764 or any other provisions of law for the residential or educational costs of placement of children with disabilities in an approved private special education school, institution or agency unless the children are evaluated and placed by a school district. The following special provisions apply in order to qualify for the group B ED-P weight:

1. If the child is placed in a private special education program, the chief administrative official of the school district or county or other person designated by the school district or county as responsible for special education shall verify that the pupil is diagnosed with an emotional disability as defined in section 15-761, that no appropriate program exists within the school district or county, as applicable, and that no program can feasibly be instituted by the school district or county, as applicable.

2. If the child is placed in a special program that provides intensive services within a school district, the chief administrative official of the school district or county or other person as designated by the school district or county as responsible for special education shall verify that the pupil placed in such a program is diagnosed with an emotional disability as defined in section 15-761 and that appropriate services cannot be provided in traditional resource and self-contained special education classes.

E. When a state placing agency initially places a pupil in a private residential facility, the home school district must conduct an evaluation pursuant to section 15-766 or review the educational placement of a pupil who has previously been determined eligible for special education services. The school district shall notify the appropriate state placing agency when a child requires an evaluation for possible receipt of services provided by that agency or a residential special education placement. The school district and the state agency shall jointly evaluate the child, including consideration of relevant information from additional sources, including probation or parole officers, caseworkers, guardians ad litem and court appointed special advocates.

F. If the child is not eligible for special education or does not require residential special education placement, sections 15-1182 and 15-1183 apply.

G. If the individualized education program team determines that a residential special education placement is the least restrictive environment in which an appropriate educational program can be provided, the home school district shall submit the following documentation to the department of education:

1. A residential special education voucher application signed by designated representatives of the state placing agency, as defined in section 15-1181, and the home school district, respectively.
2. The educational reasons for recommending the residential special education placement, including an evaluation or addendum to the evaluation that describes the instructional and behavioral interventions that were previously attempted and the educational reasons for recommending the residential special education placement, including documentation that the nature or severity of the disability is such that education in a less restrictive environment is not appropriate.
3. Exit criteria as required in subsection K of this section.
4. That prior written notice for a change in the child's placement was provided.

H. If a residential special education placement is required by the child's individualized education program, the educational component of the residential facility shall be one that is approved by the department of education for the specific special education services required.

I. The residential component of the facility in which the residential special education placement is made shall be licensed by the department of economic security or the department of health services, whichever is appropriate.

J. Following and in accordance with the consensus decision of the individualized education program team as prescribed in section 15-766, a residential special education placement shall be made by the school district and the appropriate state agency. The individualized education program team shall determine whether a residential special education placement is necessary. The state placing agency shall consider the recommendations of the individualized education program team in selecting the specific residential facility. The department of education shall enter into interagency services agreements with the department of economic security or the department of health services to establish a mechanism for resolving disputes if the school district and the department of economic security or the department of health services cannot mutually agree on the specific residential placement to be made. Dispute resolution procedures may not be used to deny or delay residential special education placement.

K. The individualized education program for any child who requires residential special education placement must include exit criteria that indicate when the educational placement of the child shall be reviewed to determine whether the child can be moved to a less restrictive placement.

L. All noneducational and nonmedical costs incurred by the placement of a child with a disability in a private or public school program and concurrent out-of-home care program shall be paid by the department of economic security for those children eligible to receive services through the division of developmental disabilities or the administration for children, youth and families of the department of economic security and by the department of health services for those children eligible to receive services through the division of behavioral health in the department of health services or children's rehabilitation services. Nothing in this section is intended to prevent or limit the department of health services and the department of economic security from joint case management of any child who qualifies for services from both agencies or from sharing the noneducational costs of providing those services. The educational costs incurred by the placement of a child with a disability in an out-of-home care facility shall be paid as follows:

1. Through a residential special education placement voucher as provided in section 15-1184 if the child is determined to require a residential special education placement as defined in section 15-761.

2. Through an initial or continuing residential education voucher if a child is placed in a private residential facility by a state placing agency, as defined in section 15-1181, for care, treatment and safety reasons and the child needs educational services while in that placement.

3. Through a certificate of educational convenience if the child is attending a public school not within the child's school district of residence as provided in section 15-825.

4. By the home school district, pursuant to a contract with a public or private school as provided in subsection D of this section, if the home school district is unable to provide satisfactory education and services through its own facilities and personnel.

M. The department of economic security or the department of health services, whichever is appropriate, shall determine if the child placed for purposes of special education in a private or public school and concurrent out-of-home care is covered by an insurance policy which provides for inpatient or outpatient child or adolescent psychiatric treatment. The appropriate state agency may only pay charges for treatment costs that are not covered by an insurance policy. Notwithstanding any other law, the appropriate state agency may pay for placement costs of the child before the verification of applicable insurance coverage. On the depletion of insurance benefits, the appropriate state agency shall resume payment for all noneducational and nonmedical costs incurred in the treatment of the child. The appropriate state agency may request the child's family to contribute a voluntary amount toward the noneducational and nonmedical costs incurred as a result of residential placement of the child. The amount which the appropriate state agency requests the child's family to contribute shall be based on guidelines in the rules of the appropriate state agency governing the determination of contributions by parents and estates. Nothing in this subsection shall be construed to require parents to incur any costs for required special education and related services or shall be construed to result in a reduction in lifetime insurance benefits available for a child with a disability.

N. If appropriate services are offered by the school district and the parent or the child chooses for the child to attend a private facility, either for day care or for twenty-four hour care, neither the school district nor the respective agency is obligated to assume the cost of the private facility. If residential twenty-four hour care is necessitated by factors such as the child's home condition and is not related to the special educational needs of the child, the agency responsible for the care of the child is not required to pay any additional costs of room and board and nonmedical expenses pursuant to this section.

15-766. Evaluation of child for placement in special education program

A. A special education referral shall be made under the direction of the chief administrative official of the school district or county, or such person officially designated as responsible for special education, after consultation with the parent or guardian.

B. Before a child is placed in a special education program an evaluation shall be made of the capabilities and limitations of the child. The evaluation shall be made by a team or group of professional education evaluation specialists with expertise in areas relevant to the child's disabilities or suspected disabilities and under the direction of the chief administrative official of the school district or county or such person officially designated as responsible for special education. The results of the comprehensive evaluation shall be considered by the multidisciplinary evaluation team in determining a pupil's eligibility for special education. The school district or county may conduct joint educational evaluations, directly or indirectly with the department of economic security, the department of health services, the department of juvenile corrections and the juvenile courts, or the school district may contract with any state agency or department for all or a portion of the components of the educational evaluations required by this section. The determination of eligibility for special education services is solely the responsibility of the multidisciplinary evaluation team. The evaluation pursuant to this section shall contain in writing, but is not limited to:

1. Reason for referral.
2. Educationally relevant medical information.
3. Educational history of the child including complete documentation of efforts to educate the child in the regular classroom.

4. Determination whether the child's educational problems are related to or resulting from reasons of educational disadvantage.
5. Developmental history of the child.
6. Types of tests administered to the child and results of such tests.
7. Other relevant information provided by the parent.
8. General recommendations regarding areas to be addressed in the child's educational program.

C. The results of the evaluation shall be submitted in writing and with recommendations to the chief administrative official of the school district or county or to such person designated by the chief administrative official as responsible for special education.

D. Any of the educational evaluation components enumerated in subsection B that are less than three years old and are appropriate to consider under the specific circumstances may be shared by and among state agencies for the purpose of expediting completion of the evaluation and placement process.

E. In determining placement the following persons shall be consulted by the chief administrative official of the school district or county or such person officially designated as responsible for special education:
1. The school principal.
2. A person responsible for administering or conducting special education courses in the school or school district and a special education teacher who may provide the special services designed for the child.
3. A teacher who currently has been instructing the child.
4. A person who is licensed, certificated or otherwise qualified pursuant to state rules in the area of the child's suspected handicap.
5. A parent or guardian of the child and, whenever appropriate, such child.
6. If the child has been referred to a state agency for an evaluation for services and residential placement is a possibility, a representative of the state agency responsible for noneducational costs of the residential program.
7. Other individuals at the discretion of the parent, school district or county.

F. The chief administrative official of the school district or county or such person officially designated as responsible for special education shall place the child, based upon the consensus recommendation of the individualized education program team and subject to due process pursuant to 20 United States Code section 1415, except that no child shall be placed in a special education program without the approval of his parent or guardian, or retained in such a program without actual notice to the parent or guardian. Placement may be made or changed pursuant to a hearing officer's decision under 20 United States Code section 1415 or an order from a court of competent jurisdiction.

15-767. Review of special education placement; report of educational progress

The placement of a child in a special education program shall be reviewed by the chief administrative official of the school district or county or such person officially designated as responsible for special education at least once each year, and a copy of the results of the review shall be submitted to the parent or guardian of the child. The educational progress of a child in a special education program shall be reviewed and reported to the parent or the guardian of the child at least once each semester.

15-771. Preschool programs for handicapped children; definition

A. Each school district shall make available an educational program for preschool children with disabilities who reside in the school district and who are not already receiving services that have been provided through the department of education. The state board of education shall prescribe rules for use by school districts in the provision of educational programs for preschool children with disabilities. School districts are required to make available educational programs for and, for the purposes of calculating average daily attendance and average daily membership, may count only those preschool children who meet the definition of one of the following conditions:
1. Hearing impairment.
2. Visual impairment.

3. Preschool moderate delay.
4. Preschool severe delay.
5. Preschool speech/language delay.

The school district may make available an educational program for speech or language impaired preschool children whose performance on a standardized language test measures one and one-half standard deviations, or less, below the mean for children of their chronological age. The superintendent of public instruction shall prescribe guidelines for the eligibility of speech or language impaired children, except that eligibility under this subsection is appropriate only when a comprehensive developmental assessment or norm-referenced assessment and parental input indicate that the child is not eligible for services under another preschool category.

B. The state board of education shall annually distribute to school districts at least twenty-five per cent of the monies it receives under 20 United States Code section 1411(c)(2) for preschool programs for children with disabilities. The state board shall prescribe rules for the distribution of the monies to school districts.

C. The governing board of a school district may submit a proposal to the state board of education as prescribed by the state board to receive monies for preschool programs for children with disabilities as provided in this section. A school district which receives monies as provided in this section shall include the monies in the special projects section of the budget as provided in section 15-903, subsection G.

D. All school districts shall cooperate, if appropriate, with community organizations that provide services to preschool children with disabilities in the provision of the district's preschool program for children with disabilities.

E. A school district may not admit a child to a preschool program for children with disabilities unless the child is evaluated and recommended for placement as provided in sections 15-766 and 15-767.

F. For purposes of this section, "preschool child" means a child who is at least three years of age but who has not reached the age required for kindergarten. A preschool child is three years of age as of the date of the child's third birthday. The governing board of a school district may admit otherwise eligible children who are within ninety days of their third birthday, if it is determined to be in the best interest of the individual child. Children who are admitted to programs for preschool children prior to their third birthday are entitled to the same provision of services as if they were three years of age. The governing board of a school district is not eligible for state or federal funding for a child who is admitted prior to the child's third birthday until the date of the child's third birthday.

15-821. Admission of children; required age

A. Unless otherwise provided by article 1.1 of this chapter or by any other provision of law, all schools shall admit children between the ages of six and twenty-one years who reside in the school district and who meet the requirements for enrollment in one of the grades or programs offered in the school.

B. If a preschool program for children with disabilities is maintained, a child is eligible for admission as prescribed in section 15-771.

C. If a kindergarten program is maintained, a child is eligible for admission to kindergarten if the child is five years of age. A child is deemed five years of age if the child reaches the age of five before September 1 of the current school year. A child is eligible for admission to first grade if the child is six years of age. A child is deemed six years of age if the child reaches the age of six before September 1 of the current school year. The governing board may admit children who have not reached the required age as prescribed by this subsection if it is determined to be in the best interest of the children. For children entering the first grade, such determination shall be based upon one or more consultations with the parent, parents, guardian or guardians, the children, the teacher and the school principal. Such children must reach the required age of five for kindergarten and six for first grade by January 1 of the current school year.

15-840. Definitions

In this article, unless the context otherwise requires:

1. "Expulsion" means the permanent withdrawal of the privilege of attending a school unless the governing board reinstates the privilege of attending the school.

2. "Suspension" means the temporary withdrawal of the privilege of attending a school for a specified period of time.

15-841. Responsibilities of pupils; certain causes for expulsion; effect of expulsion on admittance to another school district; alternative education programs; mandatory expulsion for bringing firearm to school; community service

A. Pupils shall comply with the rules, pursue the required course of study and submit to the authority of the teachers, the administrators and the governing board.

B. A pupil may be expelled for continued open defiance of authority, continued disruptive or disorderly behavior, violent behavior which includes use or display of a dangerous instrument or a deadly weapon as defined in section 13-105, use or possession of a gun, or excessive absenteeism. A pupil may be expelled for excessive absenteeism only if the pupil has reached the age or completed the grade after which school attendance is not required as prescribed in section 15-802. A school district may expel pupils for actions other than those listed in this subsection as the school district deems appropriate.

C. A school district may refuse to admit any pupil who has been expelled from another educational institution or who is in the process of being expelled from another educational institution.

D. A school district may annually or upon the request of any pupil or the parent or guardian review the reasons for expulsion and consider readmission.

E. As an alternative to suspension or expulsion, the school district may reassign any pupil to an alternative education program if good cause exists for expulsion or for a long-term suspension.

F. A school district may also reassign a pupil to an alternative educational program if the pupil refuses to comply with rules, refuses to pursue the required course of study or refuses to submit to the authority of teachers, administrators or the governing board.

G. A school district or charter school shall expel from school for a period of not less than one year a student who is determined to have brought a firearm to a school within the jurisdiction of the school district or the charter school, except that the school district or charter school may modify this expulsion requirement for a student on a case by case basis. This subsection shall be construed consistently with the requirements of the individuals with disabilities education act, 20 United States Code sections 1400 through 1420. For the purposes of this subsection:

1. "Expel" may include removing a pupil from a regular school setting and providing educational services in an alternative setting.

2. "Firearm" means a firearm as defined in 18 United States Code section 921.

H. School districts may develop a program that will allow pupils to perform community service as an alternative to suspension. The community service may be performed on school grounds or at any other designated area.

15-842. Damage to school property; suspension or expulsion of pupil; liability of parent

A. A pupil who cuts, defaces or otherwise injures any school property may be suspended or expelled.

B. Upon complaint of the governing board, the parents or guardians of minors who have injured school property shall be liable for all damages caused by their children or wards.

15-843. Pupil disciplinary proceedings

A. No action concerning discipline, suspension or expulsion of a pupil is subject to the provisions of title 38, chapter 3, article 3.1, except that the governing board of a school district shall post regular notice and shall take minutes of any hearing held by the governing board concerning the discipline, suspension or expulsion of a pupil.

B. The governing board of any school district shall, in consultation with the teachers and parents of the school district, prescribe rules for the discipline, suspension and expulsion of pupils. The rules shall include at least the following:

1. Penalties for excessive pupil absenteeism including failure in a subject, failure to pass a grade, suspension or expulsion.

2. Procedures for the use of corporal punishment if allowed by the governing board. These procedures shall be consistent with guidelines prescribed by the state board of education.

3. Procedures for the reasonable use of physical force in self-defense, defense of others and defense of property.

4. Procedures for dealing with pupils who have committed or are believed to have committed a crime.

5. A notice and hearing procedure for cases concerning the suspension of a pupil for more than ten days.

6. Procedures for appeal to the governing board of the suspension of a pupil for more than ten days, if the decision to suspend the pupil was not made by the governing board.

7. Procedures for appeal of the recommendation of the hearing officer or officers designated by the board as provided in subsection F at the time the board considers the recommendation.

C. Penalties adopted under subsection B, paragraph 1 for excessive absenteeism shall not be applied to pupils who have completed the course requirements and whose absence from school is due solely to illness, disease or accident as certified by a person licensed under title 32, chapter 7, 13 or 17.

D. The governing board shall:

1. Support and assist teachers in the implementation and enforcement of the rules prescribed in subsection B.

2. Develop procedures allowing teachers and principals to recommend the suspension or expulsion of pupils.

3. Develop procedures allowing teachers and principals to temporarily remove disruptive pupils from a class.

4. Delegate to the principal the authority to remove a disruptive pupil from the classroom.

E. If a pupil withdraws from school after receiving notice of possible action concerning discipline, expulsion or suspension, the governing board may continue with the action after the withdrawal and may record the results of such action in the pupil's permanent file.

F. In all action concerning the expulsion of a pupil, the governing board of a school district shall:

1. Be notified of the intended action.

2. Decide, in executive session, whether to hold a hearing or to designate one or more hearing officers to hold a hearing to hear the evidence, prepare a record and bring a recommendation to the board for action and whether the hearing shall be held in executive session.

3. Give written notice, at least five working days prior to the hearing by the governing board or the hearing officer or officers designated by the governing board, to all pupils subject to expulsion and their parents or legal guardians of the date, time and place of the hearing. If the governing board decides that the hearing is to be held in executive session, the written notice shall include a statement of the right of the parents or legal guardians or an emancipated pupil subject to expulsion to indicate their objection to the governing board's decision to have the hearing held in executive session. Such objections shall be made in writing to the governing board.

G. If a parent, legal guardian or emancipated pupil subject to expulsion disagrees that the hearing should be held in executive session, then it shall be held in an open meeting unless:

1. If only one pupil is subject to expulsion and disagreement exists between that pupil's parents or legal guardians, the governing board, after consultations with the pupil's parents or legal guardians or the emancipated pupil, shall decide in executive session whether the hearing will be in executive session.

2. If more than one pupil is subject to expulsion and disagreement exists between the parents of different pupils, then separate hearings shall be held subject to the provisions of this section.

H. Nothing in this section shall be construed to prevent the pupil who is subject to expulsion or suspension, and his parents or legal guardians and legal counsel, from attending any executive session pertaining to the proposed disciplinary action or from having access to the minutes and testimony of such executive session or from recording such a session at the parent's or legal guardian's expense.

I. In schools employing a superintendent or a principal, the authority to suspend a pupil from school is vested in the superintendent, principal or other school officials granted this power by the governing board of the school district.

J. In schools which do not have a superintendent or principal, a teacher may suspend a pupil from school.

K. In all cases of suspension, it shall be for good cause and shall be reported within five days to the governing board by the superintendent or the person imposing the suspension.

L. A teacher who fails to comply with this section is guilty of unprofessional conduct and his certificate shall be revoked.

M. The principal of each school shall insure that a copy of all rules pertaining to discipline, suspension and expulsion of pupils is distributed to the parents of each pupil at the time the pupil is enrolled in school.

N. The principal of each school shall insure that all rules pertaining to the discipline, suspension and expulsion of pupils are communicated to students at the beginning of each school year, and to transfer students at the time of their enrollment in the school.

15-844. Suspension and expulsion proceedings for handicapped pupils

Notwithstanding sections 15-841, 15-842 and 15-843, the suspension or expulsion of children with disabilities, as defined in section 15-761, shall be in accordance with rules which are prescribed by the state board of education and which shall incorporate the change of placement requirements of the individuals with disabilities education act (20 United States Code sections 1410 through 1485) and applicable case law regarding suspension and expulsion of children with disabilities.

15-881. Extended school year programs for handicapped pupils; eligibility and program structure; definition

A.Each school district shall make an extended school year program available to all handicapped pupils for whom such a program is necessary in order to either:

1. Prevent irreparable harm to the pupil's ability to maintain identified skills or behavior.
2. Accommodate critical learning periods for pupils who are unlikely to receive another opportunity to learn or generalize targeted skills or behavior.

B. The state board of education shall prescribe rules for use by school districts in establishing extended school year programs and in determining the eligibility of handicapped pupils for an extended school year program. The rules adopted by the state board pursuant to this subsection shall include the following criteria for determining the eligibility of handicapped pupils in an extended school year program:

1. Regression-recoupment factors.
2. Critical learning stages.
3. Least restrictive environment considerations.
4. Teacher and parent interviews and recommendations.
5. Data-based observations of the pupil.
6. Considerations of the pupil's previous history.
7. Parental skills and abilities.
8. Factors that are inappropriate considerations for eligibility.
9. Any other considerations deemed necessary and appropriate by the state board of education.

C. Rules that are adopted pursuant to subsection B of this section shall clarify that attendance in the program is not compulsory, that the program is not required for all handicapped pupils and that eligibility for participation in the program is not based on need or desire for any of the following:

1. A day care or respite care service for handicapped pupils.
2. A program to maximize the academic potential of a handicapped pupil.
3. A summer recreation program for handicapped pupils.

D. For purposes of this section "extended school year" means additional special education and related services for handicapped pupils to supplement the normal school year which are provided as part of a free and appropriate public education as defined in P.L. 94-142.

15-913. Education program; juvenile detention centers
(L95, ch 191, sec 10.)

A.Each county that operates a juvenile detention center shall offer an education program to serve all school-age children in its juvenile detention center. The county school superintendent and the presiding juvenile court judge in each county shall agree on the method of delivery of the juvenile detention center education program.

B. The state board of education shall prescribe standards and achievement testing requirements for county juvenile detention center education programs that shall attempt to ensure that the programs are compatible with public school education goals and requirements. The county school superintendent shall attempt to coordinate the program with each pupil's school district of residence to assist the pupil's transition back to the school district at the appropriate time.

C. A county may operate its juvenile detention center education program through an existing accommodation school.

D. If a county chooses not to operate its juvenile detention center education program through an existing accommodation school, the county school superintendent may establish a detention center education fund to provide financial support to the program. The detention center education fund for each program shall consist of a base amount plus a variable amount. For fiscal year 1994-1995 the base amount is twenty thousand dollars and the variable amount shall be determined pursuant to subsection E of this section. Beginning with fiscal year 1995-1996 the base amount is the amount for the prior year adjusted by the growth rate prescribed by law, subject to appropriation. The county treasurer shall deposit the appropriate amount into the detention center education fund from monies that are collected from the tax levy for county equalization assistance for education pursuant to section 15-994 after the monies are used pursuant to section 15-365, subsection F and before the monies are used to provide equalization assistance for education pursuant to section 15-971, subsection C, except that if a county detention center education program serves more than one county, payment into the fund shall be pursuant to subsection F of this section.

E. The variable amount shall be determined as follows:

1. Determine the number of days in the prior fiscal year that each child who had been in the detention center for more than forty-eight hours received an instructional program of at least two hundred forty minutes. No school district may count a child as being in attendance in that school district on a day that the child is counted for the purposes of this paragraph.

2. Multiply the number of days determined under paragraph 1 of this subsection by the following amount:

(a) For fiscal year 1994-1995, fifteen dollars.

(b) For fiscal year 1995-1996 and thereafter, the amount for the prior year adjusted by the growth rate prescribed by law, subject to appropriation.

3. For each child with a disability as defined in section 15-761 who had been in the detention center for more than forty-eight hours:

(a) Determine the amount prescribed in section 15-1204, subsection E, paragraph 1 or 2 and add one hundred dollars for capital outlay costs.

(b) Divide the sum determined under subdivision (a) of this paragraph by one hundred seventy-five.

(c) Subtract the amount prescribed in paragraph 2, subdivision (a) or (b) of this subsection from the quotient determined in subdivision (b) of this paragraph.

(d) Determine the number of days in the prior fiscal year that the child received an instructional program of at least two hundred forty minutes.

(e) Multiply the amount determined in subdivision (d) of this paragraph by the difference determined in subdivision (c) of this paragraph.

4. Add the amounts determined in paragraph 3 of this subsection for all children with disabilities.

5. Add the sum determined in paragraph 4 of this subsection to the product determined in paragraph 2 of this subsection. This sum is the variable amount.

F. If a county detention center education program serves more than one county, the county school superintendents and the presiding juvenile court judges of the counties being served shall agree on a county of jurisdiction. The county treasurer shall pay the appropriate amount into the detention center education fund of the county of jurisdiction from monies collected pursuant to subsection D of this section as follows:

1. The total base amount shall be prorated among the counties based on the total number of days as determined under subsection E, paragraph 1 of this section that children from each county were served.

2. The variable amount shall be calculated separately for each county.

3. The county treasurer of each county that is not the county of jurisdiction shall pay its variable amount and its portion of the base amount to the county of jurisdiction.

4. The county treasurer of the county of jurisdiction shall deposit the monies received from the other counties pursuant to paragraph 3 of this subsection into the detention center education fund and shall pay into the fund its variable amount and its portion of the base amount.

G. If a county operated a juvenile detention center education program through an accommodation school in the year before it begins to operate its juvenile detention center education program as provided in subsection D of this section, for the first year of operation as provided in subsection D of this section, the student count of the accommodation school shall be reduced by the student count attributable to the detention center program. The provisions of section 15-942 shall not apply to this reduction in student count.

15-913.01. Education program; county jails

A. Each county that operates a county jail shall offer an education program to serve all prisoners who are under eighteen years of age or prisoners with disabilities who are age twenty-one or younger confined in the county jail. The county school superintendent and the sheriff in each county shall agree on the method of delivery of the education program.

B. The county school superintendent shall develop policies and procedures for the transfer of educational records of any prisoner confined in a county jail who has been transferred from a juvenile detention center or from any other public agency which has provided educational services to that prisoner.

C. A county may operate its county jail education program through an existing accommodation school, except that each pupil enrolled in the accommodation school county jail education program shall be funded at an amount equal to fifty per cent of the amount for that pupil if that pupil was enrolled in another accommodation school program.

D. If a county chooses not to operate its county jail education program through an existing accommodation school, the county school superintendent may establish a county jail education fund to provide financial support to the program. The county jail education fund for each program shall consist of a base amount plus a variable amount. For fiscal year 1995-1996 the base amount is ten thousand dollars and the variable amount shall be determined pursuant to subsection E of this section. The county treasurer shall deposit the appropriate amount into the county jail education fund from monies that are collected from the tax levy for county equalization assistance for education pursuant to section 15-994 after the monies are used pursuant to section 15-365, subsection F and before the monies are used to provide equalization assistance for education pursuant to section 15-971, subsection C, except that if a county jail education program serves more than one county, payment into the fund shall be pursuant to subsection F of this section.

E. The variable amount shall be determined as follows:

1. Determine the number of days in the prior fiscal year that each pupil who is a prisoner and had been in the county jail for more than forty-eight hours received an instructional program of at least two hundred forty minutes. No school district may count a pupil as being in attendance in that school district on a day that the pupil is counted as a prisoner for the purposes of this paragraph.

2. Multiply the number of days determined under paragraph 1 of this subsection by seven dollars fifty cents.

3. For each pupil who is a child with a disability as defined in section 15-761 who is a prisoner and had been in the county jail for more than forty-eight hours:

(a) Determine the amount prescribed in section 15-1204, subsection E, paragraph 1 or 2, multiply the amount by .5 and add fifty dollars for capital outlay costs.

(b) Divide the sum determined under subdivision (a) of this paragraph by one hundred seventy-five.

(c) Subtract the amount prescribed in paragraph 2, subdivision (a) or (b) of this subsection from the quotient determined in subdivision (b) of this paragraph.

(d) Determine the number of days in the prior fiscal year that the pupil received an instructional program of at least two hundred forty minutes.

(e) Multiply the amount determined in subdivision (d) of this paragraph by the difference determined in subdivision (c) of this paragraph.

4. Add the amounts determined in paragraph 3 of this subsection for all pupils with disabilities who are prisoners.

5. Add the sum determined in paragraph 4 of this subsection to the product determined in paragraph 2 of this subsection. This sum is the variable amount.

F. If a county jail education program serves more than one county, the county school superintendents and the sheriffs of the counties being served shall agree on a county of jurisdiction. The county treasurer shall pay the appropriate amount into the county jail education fund of the county of jurisdiction from monies collected pursuant to subsection D of this section as follows:

1. The total base amount shall be prorated among the counties based on the total number of days as determined under subsection E, paragraph 1 of this section that pupils who are prisoners from each county were served.

2. The variable amount shall be calculated separately for each county.

3. The county treasurer of each county that is not the county of jurisdiction shall pay its variable amount and its portion of the base amount to the county of jurisdiction.

4. The county treasurer of the county of jurisdiction shall deposit the monies received from the other counties pursuant to paragraph 3 of this subsection into the county jail education fund and shall pay into the fund its variable amount and its portion of the base amount.

G. If a county operated a county jail education program through an accommodation school in the year before it begins to operate its county jail education program as provided in subsection D of this section, for the first year of operation as provided in subsection D of this section, the student count of the accommodation school shall be reduced by the average daily membership attributable to the accommodation school's county jail program in its last fiscal year of operation. The provisions of section 15-942 shall not apply to this reduction in student count.

15-1181. Definitions

In this article, unless the context otherwise requires:

1. "Child" means a person who is at least three years of age by September 1 of the current year but who is under twenty-two years of age.
2. "Fund" means the state special education placement and residential education voucher fund.
3. "Home school district" has the same meaning as prescribed in section 15-761.
4. "Individualized education program" has the same meaning as prescribed in section 15-761.
5. "Parent" means the natural or adoptive parent of a child, the legal guardian of a child, a relative with whom a child resides and who is acting as the parent of that child or a surrogate parent who has been appointed for a child pursuant to section 15-763.01. Parent does not mean this state if the child is a ward of the state.
6. "Place" or "placement" means placement of a child in a private residential facility for residential special education placement as defined in section 15-761 or by a state placing agency for care, safety or treatment reasons.
7. "Private residential facility" means a private facility that is licensed by the department of economic security or department of health services and to which one of the following also applies:
    (a) For special education placements, the facility has been approved by the division of special education pursuant to section 15-765 for the purpose of providing special education and related services.

(b) For other than special education placements, the facility has been accredited by the north central association of colleges and secondary schools, except that private facilities applying for initial approval as a private school are not required to receive accreditation until three years after the date of initial approval as long as continual progress toward accreditation is maintained.

8. "Related services" means related services as defined in section 15-761.

9. "Residential special education placement" has the same meaning as prescribed in section 15-761.

10. "Special education" has the same meaning as prescribed in section 15-761.

11. "State placing agency" means the department of juvenile corrections, the department of economic security, the department of health services or the administrative offices of the court.

15-1182. Voucher fund; administration

A. There is established a special education placement and residential education voucher fund which shall consist of legislative appropriations.

B. The fund shall be administered by the superintendent of public instruction for the purposes provided in this article.

C. Each fiscal year the state board of education shall include in its budget request for assistance to schools a separate line item for the special education placement and residential education voucher fund.

D. The special education placement and residential education voucher fund shall provide monies for the education of a child who has been placed in a residential facility by a state placing agency or who requires a residential special education placement as defined in section 15-761.

E. If a child has been placed in a residential facility by a state placing agency, the special education placement and residential education voucher fund shall provide monies for the following types of vouchers:

1. Initial residential education vouchers to fund the educational costs for any child, whether or not eligible for special education. This paragraph applies to a child who has been placed in a residential facility and who has either not received a comprehensive education evaluation as provided in section 15-766, who has previously received such an evaluation and was determined to be ineligible for special education services or who is eligible for special education and for whom necessary procedures for changing the child's educational placement must be completed. This voucher expires on the expiration of sixty calendar days or completion of the educational evaluation or review of special education placement, whichever occurs first.

2. Continuing residential education vouchers that fund the educational costs for any child, whether or not eligible for special education, who requires placement in a residential facility after the expiration of the initial education voucher and who is not eligible for a residential special education voucher.

F. When a school district makes a residential special education placement, the special education placement and residential education voucher fund shall provide monies to fund the residential special education placement.

G. Monies in the special education placement and residential education voucher fund are exempt from the provisions of section 35-190 relating to lapsing of appropriations. Any monies left unexpended may be distributed to school districts by the department of education for the following purposes:

1. To provide educational counseling, training and support services to a child with a disability in order to maintain the child's educational placement in the least restrictive environment.

2. To provide educational transition assistance to children who return to their home after placement in a residential facility.

3. To train personnel for and develop and implement model programs for use by school districts to serve children with emotional disabilities.

H. The total amount of state monies that may be spent in any fiscal year by the superintendent of public instruction for the purposes of this article shall not exceed the amount appropriated or authorized by section 35-173 for that purpose. This article shall not be construed to impose a duty on an officer, agent or employee of this state to discharge a responsibility or to create any right in a person or group if the discharge or right would require an expenditure of state monies in excess of the expenditure authorized by legislative appropriation for that specific purpose.

15-1183. Placement; voucher application requirements

A. A voucher may not be issued pursuant to this article and a residential special education placement may not be made in a private residential placement facility unless the requirements of section 15-765, subsection G have been met.

B. If a state placing agency places a child in a private residential facility for care, safety or treatment reasons, the state placing agency is responsible for requesting an initial residential education voucher and notifying the home school district of the placement. The home school district is responsible for completing screening or other identification procedures for determining if the child is a child with a disability as defined in section 15-761 and for reviewing the placement of a child with a disability to determine whether a residential special education placement is necessary. Responsibility for monitoring the educational services during the time a child is placed in the residential facility and for planning for transition from the private residential facility to a public school remains with the home school district.

C. An initial residential education voucher may be extended for good cause, as determined by the director of the division of special education, on application by the home school district. If an extension is denied or a home district fails to complete the requirements for a continuing residential education voucher, the home school district is responsible for payment of educational costs until the requirements of subsection B of this section have been met.

D. In order to receive a continuing residential education voucher, an evaluation pursuant to section 15-766 must be conducted and the following must occur:

1. The home school district shall provide prior written notice to the parent indicating that the child is or is not eligible for special education and shall submit to the department of education a copy of the prior written notice, the evaluation from which the eligibility decision is made and, if the child is eligible for special education but does not require residential special education placement, a copy of the individualized education program indicating the special education to be provided while the child is placed in the residential facility. If the child requires a residential special education placement, section 15-765, subsection G applies.

2. On receipt from the home school district of the documentation specified in paragraph 1, the department of education shall convert the initial residential education voucher to a continuing residential education voucher that is valid for no longer than the remainder of the school year during which it is issued.

15-1184. Vouchers; requirements; budgets; prohibited uses

(L95, ch 191, sec 18.)

A. The director of the division of special education shall develop requirements for the approval of vouchers, as provided in this section, including the following:

1. For a special education residential placement voucher, documentation that the requirements of section 15-765 have been met.

2. For an initial residential education voucher, documentation that the requirements of section 15-1183, subsection B have been met.

3. For a continuing residential education voucher, documentation that the requirements of section 15-1183, subsection C have been met.

B. The home school district shall consider recommendations from the state placing agency when determining whether the child should be placed solely in the private residential facility or should be placed for part of the school day in a school operated by a school district as provided in section 15-1185.

C. The private residential facility must demonstrate that previously received voucher monies were spent appropriately.

D. If approved, the appropriate voucher shall be issued in an amount not exceeding the sum of the following and shall be paid directly to the private residential facility in a manner prescribed by the superintendent of public instruction:

1. For group A and for placements not requiring special education services, the base level multiplied by two.

2. For group B, the sum of the support level weight as provided in section 15-943, paragraph 2, subdivision (a) for kindergarten programs through grade eight or for grades nine through twelve, whichever is appropriate, and the support level weight for the category, multiplied by the base level.

3. For both group A and group B, two hundred forty dollars for capital outlay costs or related services and fifty dollars for transportation or related services costs. Beginning with fiscal year 1991-1992, the amounts provided in this paragraph for capital outlay and transportation are increased by the growth rate prescribed by law, subject to appropriation.

E. When an initial residential education voucher expires the funding for the initial residential education voucher shall be paid directly to the private facility from the date of initial placement until the date on which the voucher expires pursuant to section 15-1183.

F. For the purpose of this article, the chief official of each state placing agency and the superintendent of public instruction shall jointly prescribe a uniform budgeting format to be submitted by each private institution and to be used in determining instructional costs and residential costs of persons placed.

G. Any residential special education placement or residential education voucher issued pursuant to this article shall not be used in any private residential facility that discriminates on the basis of race, religion, creed, color, national origin or disability.

H. Voucher monies shall only be spent to provide education and related services to children placed as provided in this article. The state board of education may withhold funding from an institution for noncompliance with any applicable statute or any applicable rule adopted by the state board.

I. The individualized education program for any child requiring a residential special education placement must include exit criteria that indicate when the educational placement of the child shall be reviewed in order to determine whether the child can be moved to a less restrictive placement.

15-1185. School district responsibility; integration into a school

A. For a child who is placed in a private residential facility pursuant to this article, the home school district is responsible for reviewing the child's educational progress and planning for integrating the child into a public school when it is educationally appropriate.

B. The private residential facility and the state placing agency shall work with the home school district for purposes of integrating the child into a public school when it is educationally appropriate.

C. If a child who has been placed in a private residential facility for care, safety or treatment reasons attends a public school in other than the home school district on either a part-time or full-time basis, the residential education voucher terminates and the following apply:

1. The school district of attendance must apply for a certificate of educational convenience as provided in section 15-825, subsection B.

2. If the child attends school in the residential facility on a part-time basis, the school district of attendance must apply for a certificate of educational convenience and either provide direct services in the residential facility or contract with the residential facility for that portion of educational services that the private residential facility is to provide.

D. If a child who requires residential special education placement is placed outside of the home school district and is able to attend a nonresidential school on a part-time basis, the residential special education placement voucher terminates. The school district of attendance shall apply for a certificate of educational convenience and pay a prorated tuition amount to the private residential facility.

15-1201. Definitions

In this article, unless the context otherwise requires:

1. "Fund" means the state permanent special education institutional voucher fund.

2. "Institution" means the Arizona state schools for the deaf and the blind, the Arizona training program facilities as provided in section 36-551 and the Arizona state hospital.

3. "Place" or "placement" means placement of a person in an institution, as defined in this section, for special education only or for special education and residential and custodial care.

4. "Special education" means the adjustment of the environmental factors, modification of the course of study and adaptation of teaching methods, materials and techniques to provide educationally for those children who are gifted or disabled to such an extent that they do not profit from the regular course of study or need special education services in order to profit. Difficulty in writing, speaking or understanding the English language due to an environmental background in which a language other than English is spoken primarily or exclusively shall not be considered a sufficient handicap to require special education.

15-1202. Permanent special education institutional voucher fund; administration; expenditure limitation

A. There is established a permanent special education institutional voucher fund which shall consist of legislative appropriations to the fund.

B. The fund shall be administered by the superintendent of public instruction for the purposes provided in this article.

C. Each fiscal year the state board of education shall include in its budget request for assistance to schools a separate line item for the permanent special education institutional voucher fund.

D. The total amount of state monies that may be spent in any fiscal year by the superintendent of public instruction for the purposes of this article shall not exceed the amount appropriated or authorized by section 35-173 for that purpose. This article shall not be construed to impose a duty on an officer, agent or employee of this state to discharge a responsibility or to create any right in a person or group if the discharge or right would require an expenditure of state monies in excess of the expenditure authorized by legislative appropriation for that specific purpose.

15-1203. Placement; requirements

A. No child may be placed for the purpose of special education in an institution unless the institution has applied for and had issued a voucher pursuant to this article. Approval shall be given when evaluation information, a copy of the individualized education program and the placement statement, which includes justification for institutional placement, are provided to the special education section of the department of education.

B. A school district may make an interim placement of an eligible child in an institution pursuant to an interim individualized education program. For purposes of this section, "interim placement" means placement of a child in an institution for a period of time not to exceed sixty days for the purpose of completing an educational evaluation as required by section 15-766 and making a specific placement.

C. No child who is a resident of an institution may be placed in a school special education program unless the school has applied for and had issued a special education institutional voucher pursuant to this article.

15-1204. Voucher, application; approval; requirements; budgets; prohibited uses; advances

A. When an institution decides to place a person in an institutional special education program, the institution, upon application to and approval by the division of special education, shall have a permanent special education institutional voucher issued pursuant to this article to pay the special education instructional costs of the person at the institution.

B. When an institution decides to place a person who resides in the institution in a school special education program, the school, upon application to and approval by the division of special education, shall have a permanent special education institutional voucher issued pursuant to this article to pay the special education instructional costs of the person in the school.

C. No person residing in an institution and attending a school may have a certificate of educational convenience issued pursuant to section 15-825, subsection A.

D. The director of the division of special education shall develop requirements for the approval of vouchers, pursuant to this section, including the requirement that the person be educationally evaluated.

E. If approved, the voucher, in an amount not exceeding the sum of the following, shall be paid directly to the institution or deposited with the county treasurer to the credit of the school, with notice to the county school superintendent:

1. For group A, the base level multiplied by two.
2. For group B, the sum of the base for kindergarten through eight and the support level weight for the category, multiplied by the base level.
3. For both group A and group B, one hundred dollars for capital outlay costs and fifty dollars for transportation costs.

F. The budget format developed cooperatively between the department of economic security and the department of education pursuant to section 8-503 shall be used by the institutions to determine and segregate residential costs from educational instructional costs.

G. If sufficient appropriated monies are available and upon a showing by an institution that additional state monies are necessary for current expenses, an advance apportionment of state aid may be paid to an institution. In no event shall an institution have received more than three-fourths of its total apportionment under this section before April 15 of the fiscal year. Early payments pursuant to this subsection must be approved by the state treasurer, the director of the department of administration and the superintendent of public instruction.

H. Notwithstanding subsection G of this section, when making the April payment to an institution, the department of education may include an additional amount based on an estimate of monies payable to the institution in May. Before the department of education apportions monies to the institution in June, it shall adjust the June payment to account for any discrepancies between the monies actually paid in April and May and the amount which should have been paid. If an overpayment in May exceeds the total amount payable in June, the institution shall refund to the department of education an amount equal to the overpayment within sixty days of notification of the overpayment. If the overpayment is not refunded within sixty days by the institution, the superintendent of public instruction shall reduce the state aid entitlement to the institution for the succeeding fiscal year to recover any overpayment of state aid received during the current fiscal year.

I. Any special education institutional voucher issued pursuant to this article shall not be used in any school or institution that discriminates on the basis of race, religion, creed, color or national origin.

J. The state board of education may withhold state aid from an institution for noncompliance with any applicable statute or any applicable rule adopted by the state board.

15-1205. Voucher; evaluation; placement; definition

A. An application for a voucher pursuant to this article shall not be approved unless the child has been educationally evaluated and recommended for placement in accordance, as nearly as practicable, with the conditions and standards prescribed by the superintendent of public instruction pursuant to rules of the state board of education.

B. In determining the recommendation for placement the chief official of the institution shall consult at a minimum with the following:

1. The parent, as defined in section 15-761 of the child recommended for placement.
2. The person performing the educational evaluation pursuant to this section.
3. A special educator who is certified in an area related to the child's disability.

C. The placing agency may sign a voucher application for submission to the department of education.

D. Nothing in this article shall be construed to prevent a child who has not been educationally evaluated from being placed in an institution if such placement is for the purpose of residential and custodial care only and not for educational reasons. The institutional voucher shall not be paid for such placements.

E. For the purposes of this section, "educationally evaluated" means an evaluation pursuant to section 15-766.

BEST COPY AVAILABLE

Section K

FAMILY EDUCATION RIGHTS & PRIVACY ACT
(F.E.R.P.A.)

§ 98.9 Investigation and findings.

(a) The Office may permit the parties to submit further written or oral arguments or information.

(b) Following its investigations, the Office provides to the complainant and recipient or contractor written notice of its findings and the basis for its findings.

(c) If the Office finds that the recipient or contractor has not complied with section 439 of the Act, the Office includes in its notice under paragraph (b) of this section:

(1) A statement of the specific steps that the Secretary recommends the recipient or contractor take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the recipient or contractor may comply voluntarily.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1232h)

§ 98.10 Enforcement of the findings.

(a) If the recipient or contractor does not comply during the period of time set under § 98.9(c), the Secretary may either:

(1) For a recipient, take an action authorized under 34 CFR Part 78, including:

(i) Issuing a notice of intent to terminate funds under 34 CFR 78.21;

(ii) Issuing a notice to withhold funds under 34 CFR 78.21, 200.94(b), or 298.45(b), depending upon the applicable program under which the notice is issued; or

(iii) Issuing a notice to cease and desist under 34 CFR 78.31, 200.94(c) or 298.45(c), depending upon the program under which the notice is issued; or

(2) For a contractor, direct the contracting officer to take an appropriate action authorized under the Federal Acquisition Regulations, including either:

(i) Issuing a notice to suspend operations under 48 CFR 12.5; or

(ii) Issuing a notice to terminate for default, either in whole or in part under 48 CFR 49.102.

(b) If, after an investigation under § 98.9, the Secretary finds that a recipient or contractor has complied voluntarily with section 439 of the Act, the Secretary provides the complainant and the recipient or contractor written notice of the decision and the basis for the decision.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1232h)

PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

Subpart A—General

Sec.

99.1 To which educational agencies or institutions do these regulations apply?
99.2 What is the purpose of these regulations?
99.3 What definitions apply to these regulations?
99.4 What are the rights of parents?
99.5 What are the rights of eligible students?
99.6 What information must an educational agency's or institution's policy contain?
99.7 What must an educational agency or institution include in its annual notification?

Subpart B—What are the Rights of Inspection and Review of Education Records?

99.10 What rights exist for a parent or eligible student to inspect and review education records?
99.11 May an educational agency or institution charge a fee for copies of education records?
99.12 What limitations exist on the right to inspect and review records?

Subpart C—What are the Procedures for Amending Education Records?

99.20 How can a parent or eligible student request amendment of the student's education records?
99.21 Under what conditions does a parent or eligible student have the right to a hearing?
99.22 What minimum requirements exist for the conduct of a hearing?

Subpart D—May an Educational Agency or Institution Disclose Personally Identifiable Information from Education Records?

99.30 Under what conditions must an educational agency or institution obtain prior consent to disclose information?
99.31 Under what conditions is prior consent not required to disclose information?

BEST COPY AVAILABLE

Sec.
99.32 What recordkeeping requirements exist concerning requests and disclosures?
99.33 What limitations apply to the redisclosure of information?
99.34 What conditions apply to disclosure of information to other educational agencies or institutions?
99.35 What conditions apply to disclosure of information for Federal or State program purposes?
99.36 What conditions apply to disclosure of information in health and safety emergencies?
99.37 What conditions apply to disclosing directory information?

Subpart E—What are the Enforcement Procedures?

99.60 What functions has the Secretary delegated to the Office and to the Education Appeal Board?
99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?
99.62 What information must an educational agency or institution submit to the Office?
99.63 Where are complaints filed?
99.64 What is the complaint procedure?
99.65 What is the content of the notice of complaint issued by the Office?
99.66 What are the responsibilities of the Office in the enforcement process?
99.67 How does the Secretary enforce decisions?

AUTHORITY: Sec. 438, Pub. L. 90-247, Title IV, as amended, 88 Stat. 571-574 (20 U.S.C. 1232g).

SOURCE: 53 FR 11943, Apr. 11, 1988, unless otherwise noted.

Subpart A—General

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) This part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary of Education that:

(1)(i) Was transferred to the Department under the Department of Education Organization Act (DEOA); and

(ii) Was administered by the Commissioner of Education on the day before the effective date of the DEOA; or

(2) Was enacted after the effective date of the DEOA, unless the law enacting the new Federal program has the effect of making section 438 of the General Education Provisions Act inapplicable.

(Authority: 20 U.S.C. 1230, 1232g, 3487, 3507)

(b) The following chart lists the funded programs to which Part 99 does not apply as of April 11, 1988:

Name of program	Authorizing statute	Implementing regulations
1. High School Equivalency Program and College Assistance Migrant Program.	Section 418A of the Higher Education Act of 1965 as amended by the Education Amendments of 1980 (Pub. L. 96–374) 20 U.S.C. 1070d-2).	Part 206.
2. Programs administered by the Commissioner of the Rehabilitation Services Administration, and the Director of the National Institute on Disability and Rehabilitation Research.	The Rehabilitation Act of 1973, as amended. (29 U.S.C. 700, *et seq.*).	Parts 350–359, 361, 365, 368, 369–371, 373–375, 378, 379, 385–390, and 395.
3. Transition program for refugees children	Immigration and Nationality Act, as amended by the Refugee Act of 1980, Pub. L. 96–212 (8 U.S.C. 1522(d)).	Part 538.
4. College Housing	Title IV of the Housing Act of 1950, as amended (12 U.S.C. 1749, *et seq.*).	Part 614.

Name of program	Authorizing statute	Implementing regulations
5. The following programs administered by the Assistant Secretary for Educational Research and Improvement: Educational Research Grant Program. Regional Educational Laboratories Research and Development Centers. All other research or statistical activities funded under Section 405 or 406 of the General Education Provisions Act.	Section 405 of the General Education Provisions Act (20 U.S.C. 1221e), and section 406 of the General Education Provisions Act (20 U.S.C. 1221-1).	Parts 700, 706-708.

NOTE: The Secretary, as appropriate, updates the information in this chart and informs the public.

(c) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(d) The Secretary considers funds to be made available to an educational agency or institution of funds under one or more of the programs referenced in paragraph (a) of this section—

(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or

(2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (Titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(e) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

(Authority: 20 U.S.C. 1232g)

§ 99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 438 of the General Education Provisions Act, as amended.

(Authority: 20 U.S.C. 1232g)

(NOTE: 34 CFR 300.560-300.576 contain requirements regarding confidentiality of information relating to handicapped children who receive benefits under the Education of the Handicapped Act.)

§ 99.3 What definitions apply to these regulations?

The following definitions apply to this part:

"Act" means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 438 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g)

"Attendance" includes, but is not limited to:

(a) Attendance in person or by correspondence; and

(b) The period during which a person is working under a work-study program.

(Authority: 20 U.S.C. 1232g)

"Directory information" means information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

"Disclosure" means to permit access to or the release, transfer, or other communication of education records, or the personally indentifiable information contained in those records, to any party, by any means, including oral, written, or electronic means.

(Authority: 20 U.S.C. 1232g(b)(1))

"Educational agency or institution" means any public or private agency or institution to which this part applies under § 99.1(a).

(Authority: 20 U.S.C. 1232g(a)(3))

"Education records" (a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;

(2) Records of a law enforcement unit of an educational agency or institution, but only if education records maintained by the agency or institution are not disclosed to the unit, and the law enforcement records are:

(i) Maintained separately from education records;

(ii) Maintained solely for law enforcement purposes; and

(iii) Disclosed only to law enforcement officials of the same jurisdiction;

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution.

(Authority: 20 U.S.C. 1232g(a)(4))

"Eligible student" means a student who has reached 18 years of age or is attending an institution of postsecondary education.

(Authority: 20 U.S.C. 1232g(d))

"Institution of postsecondary education" means an institution that provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

(Authority: 20 U.S.C. 1232g(d))

"Parent" means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

(Authority: 20 U.S.C. 1232g)

"Party" means an individual, agency, institution, or organization.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

"Personally identifiable information" includes, but is not limited to:

(a) The student's name;

(b) The name of the student's parent or other family member;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number or student number;

(e) A list of personal characteristics that would make the student's identity easily traceable; or

(f) Other information that would make the student's identity easily traceable.

(Authority: 20 U.S.C. 1232g)

"Record" means any information recorded in any way, including, but not limited to, handwriting, print, tape, film, microfilm, and microfiche.

(Authority: 20 U.S.C. 1232g)

"Secretary" means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

(Authority: 20 U.S.C. 1232g)

"Student", except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

(Authority: 20 U.S.C. 1232g(a)(6))

§ 99.4 What are the rights of parents?

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

(Authority: 20 U.S.C. 1232g)

§ 99.5 What are the rights of eligible students?

(a) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) If an individual is or has been in attendance at one component of an educational agency or institution, that attendance does not give the individual rights as a student in other components of the agency or institution to which the individual has applied for admission, but has never been in attendance.

(Authority: 20 U.S.C. 1232g(d))

§ 99.6 What information must an educational agency's or institution's policy contain?

(a) Each educational agency or institution shall adopt a policy regarding how the agency or institution meets the requirements of the Act and of this part. The policy must include:

(1) How the agency or institution informs parents and students of their rights, in accord with § 99.7;

(2) How a parent or eligible student may inspect and review education records under § 99.10, including at least:

(i) The procedure the parent or eligible student must follow to inspect and review the records;

(ii) With an understanding that it may not deny access to education records, a description of the circumstances in which the agency or institution believes it has a legitimate cause to deny a request for a copy of those records;

(iii) A schedule of fees (if any) to be charged for copies; and

(iv) A list of the types and locations of education records maintained by the agency or institution, and the titles and addresses of the officials responsible for the records;

(3) A statement that personally identifiable information will not be released from an education record without the prior written consent of the parent or eligible student, except under one or more of the conditions described in § 99.31;

(4) A statement indicating whether the educational agency or institution has a policy of disclosing personally identifiable information under § 99.31(a)(1), and , if so, a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest;

(5) A statement that a record of disclosures will be maiintained as required by § 99.32, and that a parent or eligible student may inspect and review that record;

(6) A specification of the types of personally identifiable information the agency or institution has designated as directory information under § 99.37; and

(7) A statement that the agency or institution permits a parent or eligible student to request correction of the student's education records under § 99.20, to obtain a hearing under § 99.21(a), and to add a statement to the record under § 99.21(b)(2).

(b) The educational agency or institution shall state the policy in writing and make a copy of it available on request to a parent or eligible student.

(Approved by the Office of Management and Budget under control number 1880-0508)

(Authority: 20 U.S.C. 1232g(e) and (f))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988]

§ 99.7 What must an educational agency or institution include in its annual notification?

(a) Each educational agency or institution shall annually notify parents of students currently in attendance, and eligible students currently in attendance, at the agency or institution of their rights under the Act and this part. The notice must include a statement that the parent or eligible student has a right to:

(1) Inspect and review the student's education records;

(2) Request the amendment of the student's education records to ensure that they are not inaccurate, misleading, or otherwise in violation of the student's privacy or other rights;

(3) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and the regulations in this part authorize disclosure without consent;

(4) File with the U.S. Department of Education a complaint under § 99.64 concerning alleged failures by the agency or institution to comply with the requirements of the act and this part; and

(5) Obtain a copy of the policy adopted under § 99.6.

(b) The notice provided under paragraph (a) of this section must also indicate the places where copies of the policy adopted under § 99.6 are located.

(c) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents and eligible students of their rights.

(d) An agency or institution of elementary or secondary education shall effectively notify parents of students who have a primary or home language other than English.

(Approved by the Office of Management and Budget under control number 1880-0508)

(Authority: 20 U.S.C. 1232g(e))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988]

Subpart B—What are the Rights of Inspection and Review of Education Records?

§ 99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under § 99.12, each educational agency or institution shall permit a parent or eligible student to inspect and review the education records of the student.

(b) The educational agency or institution shall comply with a request for access to records within a reasonable period of time, but in no case more than 45 days after it has received the request.

(c) The educational agency or institution shall respond to reasonable requests for explanations and interpretations of the records.

(d) The educational agency or institution shall give the parent or eligible student a copy of the records if failure to do so would effectively prevent the parent or student from exercising the right to inspect and review the records.

(e) The educational agency or institution shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an education agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of "Education records" in § 99.3, the student may have those records reviewed by a physician or other appropriate professional of the student's choice.

(Authority: 20 U.S.C. 1232g(a)(1)(A))

§ 99.11 May an educational agency or institution charge a fee for copies of education records?

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

(Authority: 20 U.S.C. 1232g(a)(1))

§ 99.12 What limitations exist on the right to inspect and review records?

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect, review, or be informed of only the specific information about that student.

(b) A postsecondary institution does not have to permit a student to inspect and review education records that are:

(1) Financial records, including any information those records contain, of his or her parents;

(2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and

(3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if:

(i) The student has waived his or her right to inspect and review those letters and statements; and

(ii) Those letters and statements are related to the student's:

(A) Admission to an educational institution;

(B) Application for employment; or

(C) Receipt of an honor or honorary recognition.

(c)(1) A waiver under paragraph (b)(3)(i) of this section is valid only if:

(i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and

(ii) The waiver is made in writing and signed by the student, regardless of age.

(2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall:

(i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and

(ii) Use the letters and statements of recommendation only for the purpose for which they were intended.

(3)(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.

(ii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

(Authority: 20 U.S.C. 1232g(a)(1) (A) and (B))

Subpart C—What are the Procedures for Amending Education Records?

§ 99.20 How can a parent or eligible student request amendment of the student's education records?

(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy or other rights, he or she may ask the educational agency or institution to amend the record.

(b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

(c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.

(Authority: 20 U.S.C. 1232g(a)(2))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988]

§ 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy or other rights of the student.

(b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student, it shall:

(i) Amend the record accordingly; and

(ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall:

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

(Authority: 20 U.S.C. 1232g(a)(2))

§ 99.22 What minimum requirements exist for the conduct of a hearing?

The hearing required by § 99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

(Authority: 20 U.S.C. 1232g(a)(2))

Subpart D—May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?

§ 99.30 Under what conditions must an educational agency or institution obtain prior consent to disclose information?

(a) Except as provided in § 99.31, an educational agency or institution shall obtain a signed and dated written consent of a parent or an eligible student before it discloses pesonally identifiable information from the student's education records.

(b) The written consent must:

(1) Specify the records that may be disclosed;

(2) State the purpose of the disclosure; and

(3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section:

(1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and

(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed.

(Authority: 20 U.S.C. 1232g (b)(1) and (b)(2)(A))

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll.

(3) The disclosure is, subject to the requirements of § 99.35, to authorized representatives of:

(i) The Comptroller General of the United States;

(ii) The Secretary; or

(iii) State and local educational authorities.

(4)(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to:

(A) Determine eligibility for the aid;

(B) Determine the amount of the aid;

(C) Determine the conditions for the aid; or

(D) Enforce the terms and conditions of the aid.

(ii) As used in paragraph (a)(4)(i) of this section, "financial aid" means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(1)(D))

(5)(i) The disclosure is to State and local officials or authorities, if a State statute adopted before November 19, 1974, specifically requires disclosures to those officials and authorities.

(ii) Paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type of State or local officials to whom disclosures may be made under that paragraph.

(6)(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to:

(A) Develop, validate, or administer predictive tests;

(B) Administer student aid programs; or

(C) Improve instruction.

(ii) The agency or institution may disclose information under paragraph (a)(6)(i) of this section only if:

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization; and

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted.

(iii) For the purposes of paragraph (a)(6) of this section, the term "organization" includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954.

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.

(11) The disclosure is information the educational agency or institution has designated as "directory information", under the conditions described in § 99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(b) This section does not forbid or require an educational agency or institution to disclose personally identifiable information from the education records of a student to any parties under paragraphs (a) (1) through (11) of this section.

(Authority: 20 U.S.C. 1232g (a)(5)(A), (b)(1) and (b)(2)(B))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988]

§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?

(a)(1) An educational agency or institution shall maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student.

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include:

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(b) If an educational agency or institution discloses personally identifiable information from an education record with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include:

(1) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(2) The legitimate interests under § 99.31 which each of the additional parties has in requesting or obtaining the information.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.

(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in § 99.31(a) (1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to:

(1) The parent or eligible student;

(2) A school official under § 99.31(a)(1);

(3) A party with written consent from the parent or eligible student; or

(4) A party seeking directory information.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

(Approved by the Office of Management and Budget under control number 1880-0508)

§ 99.33 What limitations apply to the redisclosure of information?

(a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if:

(1) The disclosures meet the requirements of § 99.31; and

(2) The educational agency or institution has complied with the requirements of § 99.32(b).

(c) Paragraph (a) of this section does not apply to disclosures of directory information under § 99.31(a)(11) or to disclosures to a parent or student under § 99.31(a)(12).

(d) Except for disclosures under § 99.31(a) (11) and (12), an educational agency or institution shall inform a party to whom disclosure is made of the requirements of this section.

(Authority: 20 U.S.C. 1232g(b)(4)(B))

§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

(a) An educational agency or institution that discloses an education record under § 99.31(a)(2) shall:

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:

(i) The disclosure is initiated by the parent or eligible student; or

(ii) The policy of the agency or institution under § 99.6 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll;

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under Subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if:

(1) The student is enrolled in or receives services from the other agency or institution; and

(2) The disclosure meets the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(b)(1)(B))

§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

(a) The officials listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs.

(b) Information that is collected under paragraph (a) of this section must:

(1) Be protected in a manner that does not permit personal identification of individuals by anyone except the officials referred to in paragraph (a) of this section; and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if:

(1) The parent or eligible student has given written consent for the disclosure under § 99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

(Authority: 20 U.S.C. 1232g(b)(3))

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) Paragraph (a) of this section shall be strictly construed.

(Authority: 20 U.S.C. 1232g(b)(1)(I))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988]

§ 99.37 What conditions apply to disclosing directory information?

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without meeting the conditions in paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(a)(5) (A) and (B))

Subpart E—What are the Enforcement Procedures?

§ 99.60 What functions has the Secretary delegated to the Office and to the Education Appeal Board?

(a) For the purposes of this subpart, "Office" means the Family Policy and Regulations Office, U.S. Department of Education.

(b) The Secretary designates the Office to:

(1) Investigate, process, and review complaints and violations under the Act and this part; and

(2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Education Appeal Board to act as the Review Board required under the Act.

(Authority: 20 U.S.C. 1232g (f) and (g), 1234)

§ 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it shall notify the Office within 45 days, giving the text and citation of the conflicting law.

(Authority: 20 U.S.C. 1232g(f))

§ 99.62 What information must an educational agency or institution submit to the Office?

The Office may require an educational agency or institution to submit reports containing information necessary to resolve complaints under the Act and the regulations in this part.

(Authority: 20 U.S.C. 1232g (f) and (g))

§ 99.63 Where are complaints filed?

A person may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy and Regulations Office, U.S. Department of Education, Washington, DC 20202.

(Authority: 20 U.S.C. 1232g(g))

§ 99.64 What is the complaint procedure?

(a) A complaint filed under § 99.63 must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred.

(b) The Office investigates each timely complaint to determine whether the educational agency or institution has failed to comply with the provisions of the Act or this part.

(Authority: 20 U.S.C. 1232g(f))

§ 99.65 What is the content of the notice of complaint issued by the Office?

(a) If the Office receives a complaint, it notifies the complainant and the educational agency or institution against which the violation has been alleged, in writing, that the complaint has been received.

(b) The notice to the agency or institution under paragraph (a) of this section:

(1) Includes the substance of the alleged violation; and

(2) Informs the agency or institution that the Office will investigate the complaint and that the educational

agency or institution may submit a written response to the complaint.

(Authority: 20 U.S.C. 1232g(g))

§ 99.66 What are the responsibilities of the Office in the enforcement process?

(a) The Office reviews the complaint and response and may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant and the educational agency or institution written notice of its findings and the basis for its findings.

(c) If the Office finds that the educational agency or institution has not complied with the Act or this part, the notice under paragraph (b) of this section:

(1) Includes a statement of the specific steps that the agency or institution must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily.

(Authority: 20 U.S.C. 1232g(f))

§ 99.67 How does the Secretary enforce decisions?

(a) If the eductional agency or institution does not comply during the period of time set under § 99.66(c), the Secretary may take an action authorized under 34 CFR Part 78, including:

(1) Issuing a notice of intent to terminate funds under 34 CFR 78.21;

(2) Issuing a notice to withhold funds under 34 CFR 78.21, 200.94(b) or 298.45(b), depending upon the applicable program under which the notice is issued; or

(3) Issuing a notice to cease and desist under 34 CFR 78.31, 200.94(c) or 298.45(c), depending upon the program under which the notice is issued.

(b) If, after an investigation under § 99.66, the Secretary finds that an educational agency or institution has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution written notice of the decision and the basis for the decision.

(NOTE: 34 CFR Part 78 contains the regulations of the Education Appeal Board.)

(Authority: 20 U.S.C. 1232g(g))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988]

[Federal Register: March 14, 1996 (Volume 61, Number 51)]
[Proposed Rules]
[Page 10663-10669]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]

[[Page 10663]]

Part III

Department of Education

---

34 CFR Part 99

Family Educational Rights and Privacy; Proposed Rule

[[Page 10664]]

DEPARTMENT OF EDUCATION

34 CFR Part 99

RIN 1880-AA71

Family Educational Rights and Privacy

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations implementing the Family Educational Rights and Privacy Act (FERPA). The amendments are needed to implement section 249 of the Improving America's Schools Act of 1994 (IASA) (Pub. L. 103-382, enacted October 20, 1994), to eliminate unnecessary requirements and reduce regulatory burden, and to incorporate several technical changes.

DATES: Comments must be received on or before May 13, 1996.

ADDRESSES: All comments concerning these proposed regulations should be addressed to LeRoy Rooker, U.S. Department of Education, 600

Independence Avenue, SW., Room 1366, Washington, D.C. 20202-4605. Comments may also be sent through the Internet to FERPA____Comments@ed.gov.

To ensure that public comments have maximum effect in developing the final regulations, the Department urges that each comment clearly identify the specific section or sections of the regulations that the comment addresses and that comments be in the same order as the regulations.

Comments that concern information collection requirements must be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act of 1995 section of this preamble. A copy of those comments may also be sent to the Department representative named in the preceding paragraph.

FOR FURTHER INFORMATION CONTACT: Sharon Shirley, U.S. Department of Education, 600 Independence Avenue, SW., Room 1366, Washington, D.C. 20202-4605. Telephone: (202) 260-3887. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: These proposed regulations have been reviewed and revised in accordance with the Department's ``Principles for Regulating,'' which were developed to ensure that the Department regulates in the most flexible, most equitable, and least burdensome way possible. These principles advance the regulatory reinvention and customer service objectives of the Administration's National Performance Review II and are essential to an effective partnership with States and localities. The Secretary proposes these regulations because he believes they are necessary to implement the law and give the greatest flexibility to local governments and schools. In addition, the regulations minimize burden while protecting parents' and students' rights.

Summary of Major Provisions

The following is a summary of the regulatory provisions the Secretary proposes as necessary to implement the statute, such as interpretations of statutory text or standards and procedures for the operation of the program. The summary does not address provisions that merely restate statutory language. The Secretary is not authorized to change statutory requirements. Commenters are requested to direct their comments to the regulatory provisions that would implement the statute.

Section 99.1 Applicability

FERPA applies to educational agencies and institutions to which funds are made available under any program which is administered by the Secretary. The proposed clarification of the terms ``educational agency'' and ``educational institution'' is necessary to indicate that FERPA does not, as a whole, apply to State educational agencies (SEAs), which provide supervision of, but no administrative control or direction of, public elementary and secondary schools. The proposed clarification of ``educational agency'' is adapted from the definition of ``local educational agency'' in 34 CFR 77.1 and is modified, in particular, to reflect that FERPA applies to certain postsecondary administrative agencies, such as those found in university systems. FERPA was amended by the IASA to require SEAs to afford parents access to their children's education records. In general, that right of access to records is the only right parents are afforded by FERPA with regard to education records maintained by SEAs.

Section 99.3 Definitions

The Secretary proposes to amend the definition of the term ``record'' in the regulations to reflect changing technology and changing modes of maintaining information. The proposed term ``computer media'' is intended to cover any manner of maintaining information that is stored through and retrieved by a computer, including information stored on CD-ROM.

Section 99.7 Annual Notification of Rights

The statute requires that educational agencies and institutions effectively inform parents and eligible students of their rights. The statute does not, however, require that educational agencies and institutions adopt a formal written student records policy. The Secretary proposes to remove the requirement in Sec. 99.6 that educational agencies and institutions adopt a formal written student records policy. The Secretary further proposes to amend the regulations so that each educational agency and institution will be required to notify parents and eligible students not only of their basic rights under FERPA but also of how to pursue those rights at that specific agency or institution.

The current regulations require that educational agencies or institutions inform parents and eligible students of their basic rights. The current regulations also require that the procedures for pursuing those rights be set forth in a student records policy, a copy of which parents and eligible students may have upon request. However, the Secretary believes that, based on the nature of recent complaints under FERPA, parents and eligible students rarely seek access to the student records policy and thus remain uninformed of how to pursue their rights at that particular school, such as the appropriate procedure to seek access to education records. The Secretary also believes that removing the requirement for a student records policy and adding additional requirements to the annual notification of rights will lessen burden on institutions and will reduce administrative costs because only one document will be required.

The Secretary believes that implementation of Congress' mandate that students and parents be ``effectively'' notified of their rights can best be achieved by requiring additional information in the annual notification of rights. In that way, parents and eligible students would receive more effective notification of their rights and how to pursue them. The Secretary further believes that, because many of the items required by current regulations to be in a formal written student records policy are not necessary to implement the law, the removal of the requirements would give educational agencies and institutions greater flexibility. Initially, there may be an additional cost because schools will have to change their annual notifications, but this is outweighed by

[[Page 10665]]

the elimination of the student records policy requirement. These two changes together would reduce burden on educational agencies and institutions and would ensure that parents and eligible students are more aware of how to pursue their rights.

The Secretary would allow educational agencies and institutions up to three years to transfer from the current requirements and to implement the new requirements. In order to provide guidance to educational agencies and institutions, the Department would develop a model annual notice that meets the new requirements and will make it available upon publication of the final regulations. Also, for those agencies and institutions that choose to adopt a formal written student records policy, the Department would continue to update and make available its model student records policy.

BEST COPY AVAILABLE

Section 99.10 Right To Inspect and Review Education Records

Under section 444(a) of GEPA, SEAs that maintain education records are required to afford parents the right to inspect and review their children's education records. The Secretary believes that this new statutory requirement should be implemented, to the greatest extent possible, in the same manner as the current regulations for educational agencies and institutions to afford parents access to education records. Therefore, the Secretary proposes to amend the access provisions in the current regulations to set forth the new requirements for SEAs to afford parents access to education records. The Secretary proposes to apply to SEAs the same requirement that applies to educational agencies and institutions, i.e., that they provide a parent or eligible student access to education records within 45 days of receipt of a request. The Secretary requests comments regarding whether this time frame for SEAs to retrieve records and provide access to them is reasonable.

The Secretary recognizes that this statutory amendment will impose new burdens for SEAs, and seeks comments in particular from the SEAs as to how this provision can be administered without significantly impeding the duties and day-to-day operations of the SEAs. The Secretary seeks comments on how this provision can be implemented with minimal burden on SEAs while still affording parents their full statutory right of access under FERPA. Finally, the Secretary also seeks comments from the SEAs as to what types of records they maintain that are directly related to students.

Section 99.31(a)(5) Prior Consent Not Required for Disclosure to Juvenile Justice Systems

The proposed regulations implement a new statutory provision that permits, under certain circumstances, the disclosure of education records if allowed by State law and if the disclosure concerns the juvenile justice system's ability to serve, prior to adjudication, the student whose records are released. The Secretary has not proposed to define the terms ``juvenile justice system'' and ``prior to adjudication'' to give States flexibility to define these terms consistent with State law and practice. The Secretary is not aware of any advantage or need for a uniform definition.

Section 99.31(a)(9) Prior Consent Not Required for Disclosures Pursuant to Court Orders and Lawfully Issued Subpoenas

The Secretary proposes that educational agencies and institutions shall not be required to notify parents or eligible students prior to disclosures of education records pursuant to a federal grand jury subpoena or a subpoena issued for a law enforcement purpose. The Secretary also proposes a new regulatory provision regarding the disclosure of education records when an educational agency or institution initiates legal action against a parent or student.

The new regulatory provision would clarify that FERPA permits an educational agency or institution to release education records in court without a parent's or eligible student's prior written consent if the educational agency or institution is initiating legal action against the parent or student, and the agency or institution has made a reasonable effort to notify the parent or eligible student of the intent to disclose in advance. The purpose of this notification requirement is to give the parent or eligible student the opportunity to seek a protective order, if the parent or student does not want personally identifiable information disclosed to the public. This new provision will impose a minimal burden on schools; however, the cost of notification to parents is outweighed by the benefit to parents who will be notified prior to the release of their children's education records to a court.

Section 99.36 Disclosure of Information From Disciplinary Records

The statute was amended by the IASA to make explicit that FERPA does not prevent educational agencies and institutions from maintaining records related to a disciplinary action taken against a student for behavior that posed a significant risk to the student or others or from disclosing this information to school officials who have been determined to have a legitimate educational interest in the behavior of the student. These matters were implicit in the statute prior to the change.

The statutory amendment also permits the disclosure of information regarding disciplinary action to school officials in other schools that have a legitimate educational interest in the behavior of the student. The Secretary interprets the statute to allow a school official to disclose information regarding disciplinary action to school officials in schools where a student is not in attendance. The Secretary believes that officials in other schools have a legitimate educational interest in cultivating a safe school environment.

For example, if a school official knows that a student, who has been disciplined for carrying a weapon, is planning to attend a school-sponsored activity at another high school, FERPA would not prohibit the school official from notifying school officials at the other high school.

The Secretary believes this interpretation is consistent with Congress' intent. The Secretary welcomes comment on this provision. While this provision imposes a potential cost to students and parents, because education records may be released without their consent, that cost is minimal and is outweighed by the interests of others whose safety may be at stake.

Executive Order 12866

1. Assessment of Costs and Benefits

These proposed regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary to administer this program effectively and efficiently. Burdens specifically associated with information collection requirements, if any, are identified and explained elsewhere in this preamble under the heading Paperwork Reduction Act of 1995.

In assessing the potential costs and benefits--both quantitative and qualitative--of these proposed regulations, the Secretary has

[[Page 10666]]
determined that the benefits of the proposed regulations justify the costs.

To assist the Department in complying with specific requirements of Executive Order 12866, the Secretary invites comment on whether there may be further opportunities to reduce any potential costs or increase potential benefits resulting from these proposed regulations without impeding the effective and efficient administration of the program.

The potential costs and benefits of these proposed regulations are discussed elsewhere in this preamble under the following topic headings: Sec. 99.7 Annual notification of rights; Sec. 99.10 Right to inspect and review education records; Sec. 99.31 Prior consent not required for disclosure; and Sec. 99.36 Disclosure of information from disciplinary records.

2. Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed regulations clearly stated? (2) Do the regulations contain technical terms or other wording that interferes with their clarity? (3) Does the format of the regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity? Would the regulations be easier to understand if they were divided into more (but shorter) sections? (A ``section'' is preceded by the symbol ``Sec. '' and a numbered heading; for example, Sec. 99.1 To which educational agencies or institutions do these regulations apply?) (4) Is the description of the regulations in the ``Supplementary Information'' section of this preamble helpful in understanding the regulations? How could this description be more helpful in making the regulations easier to understand? (5) What else could the Department do to make the regulations easier to understand?

A copy of any comments that concern how the Department could make these proposed regulations easier to understand should be sent to Stanley M. Cohen, Regulations Quality Officer, U.S. Department of Education, 600 Independence Avenue, SW. (Room 5121 FOB-10B), Washington, D.C. 20202-2241.

Regulatory and Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

The small entities that would be affected by these proposed regulations are small local educational agencies (LEAs) receiving Federal funds from the Department. However, the regulations would not have a significant economic impact on the small LEAs affected because the regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision. The regulations would impose minimal requirements to ensure that LEAs comply with the educational privacy protection requirements in FERPA.

Paperwork Reduction Act of 1995

Sections 99.7 and 99.32 contain information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of these sections to the Office of Management and Budget (OMB) for its review.

Collection of Information: Family Educational Rights and Privacy.

SEAs, LEAs, postsecondary institutions, and other recipients may be affected by these regulations. The Department needs and uses the information to ensure compliance with requirements in FERPA. Annual public reporting burden for this collection of information is estimated to be .25 hours per response for 28,075 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 7,018.75 hours.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Wendy Taylor, Desk Officer for U.S. Department of Education.

The Department considers comments by the public on this proposed collection of information in--

<bullet> Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have a practical utility;

<bullet> Evaluating the accuracy of the Department's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

<bullet> Enhancing the quality, usefulness, and clarity of the information to be collected; and

<bullet> Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the proposed regulations.

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations. This section highlights those issues already discussed in the preamble on which the Secretary would particularly like comment.

The Secretary has attempted to balance a desire to ensure that parents are afforded their rights under the law with a desire to be as flexible as possible in imposing requirements on educational agencies and institutions. The Secretary believes this balance can be achieved through these proposed amendments to the regulations, in particular through the changes to the annual notification of rights and the removal of the requirement to adopt a written student records policy. The Secretary requests specific comments on these proposed changes to the notice, in particular regarding the extent to which they will affect schools and parents and students.

As previously stated in the preamble, the Secretary would like comments on whether the proposed regulations regarding the requirement of SEAs to afford access to education records will create significant burden and disruption of operations on the SEAs and any suggestions as to how to minimize any such burdens or disruptions.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 1366, FOB-10B, 600 Independence Avenue, SW., Washington, D.C., between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

[[Page 10667]]

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 99

Administrative practice and procedure, Education, Information, Privacy, Parents, Records, Reporting and recordkeeping requirements, Students.

Dated: January 11, 1996.
Richard W. Riley,
Secretary of Education.
(Catalog of Federal Domestic Assistance Number does not apply)

The Secretary proposes to amend Part 99 of Title 34 of the Code of Federal Regulations as follows:

PART 99--FAMILY EDUCATIONAL RIGHTS AND PRIVACY

1. The authority citation for Part 99 continues to read as follows:

Authority: 20 U.S.C. 1232g, unless otherwise noted.

2. Section 99.1 is amended by removing paragraph (b), redesignating paragraphs (c), (d), and (e) as paragraphs (b), (c), and (d), respectively, and by revising paragraph (a) to read as follows:

Sec. 99.1 To which educational agencies or institutions do these regulations apply?

(a) Except as otherwise noted in Sec. 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if--

(1) The educational institution provides educational services or instruction, or both, to students; or

(2) The educational agency provides administrative control of or direction of, or performs service functions for, public elementary or secondary schools or postsecondary institutions.

* * * * *

Sec. 99.2 [Amended]

3. Section 99.2 is amended by removing the number ``438'' and adding, in its place, the number ``444''.

4. Section 99.3 is amended by removing in the definition of ``Act'' the number ``438'' and adding, in its place, the number ``444'' and by revising the definitions of ``Disclosure'' and ``Record'' to read as follows:

Sec. 99.3 What definitions apply to these regulations?

* * * * *

Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means.

* * * * *

Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.

* * * * *

Sec. 99.6 [Removed and reserved]

5. Section 99.6 is removed and reserved.

6. Section 99.7 is revised to read as follows:

Sec. 99.7 What must an educational agency or institution include in its annual notification?

(a)(1) Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act and this part.

(2) The notice must inform parents or eligible students that they have the right to--

(i) Inspect and review the student's education records;

(ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;

(iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and Sec. 99.31 authorize disclosure without consent; and

(iv) File with the Department a complaint under Secs. 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of the Act and this part.

(3) The notice must include the following:

(i) The procedure for exercising the right to inspect and review education records.

(ii) The procedure for--

(A) Requesting amendment of records under Sec. 99.20;

(B) Obtaining a hearing regarding a denial of a request for amendment of records under Secs. 99.21 and 99.22; and

(C) Adding a statement to the record under Sec. 99.21.

(iii) The conditions in Sec. 99.31 under which the educational agency or institution may disclose education records without a parent's or eligible student's prior written consent.

(iv) If the educational agency or institution has a policy of disclosing education records under Sec. 99.31(a)(1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

(v) If the educational agency or institution has a policy of disclosing education records under Sec. 99.31(a)(11), in accordance with Sec. 99.37, a specification of--

(A) The types of personally identifiable information the agency or institution has designated as directory information;

(B) A parent's or eligible student's right to refuse to allow the agency or institution to designate specific types of information about the student as directory information; and

(C) The period of time which a parent or eligible student has to notify the agency or institution that he or she does not want the agency or institution to designate specific types of information about the student as directory information.

(b) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights.

(1) An educational agency or institution shall effectively notify parents or eligible students who are disabled.

(2) An agency or institution of elementary or secondary education shall effectively notify parents who have a primary or home language other than English.

(Authority: 20 U.S.C. 1232g(e) and (f)).

7. Section 99.10 is amended by adding in paragraphs (c) and (e) `` or SEA or its component'' following the word ``institution'' and by revising paragraphs (a), (b), and (d), and the authority citation to read as follows:

Sec. 99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under Sec. 99.12, a parent or eligible student shall be given the opportunity to inspect and review the student's education records. This provision applies to--

(1) Any educational agency or institution; and

(2) Any State educational agency (SEA) and its components.

(i) For the purposes of subpart B of this part, an SEA and its components constitute an educational agency or institution.

(ii) An SEA and its components are subject to Subpart B of this part if the

[[Page 10668]]

SEA maintains education records on students who are or have been in attendance at any school of an educational agency or institution subject to the Act and this part.

(b) The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

* * * * *

(d) If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall--

(1) Provide the parent or eligible student with a copy of the records requested; or

(2) Make other arrangements for the parent or eligible student to inspect and review the requested records.

* * * * *

(Authority: 20 U.S.C. 1232g(a)(1)(A) and (B))

Sec. 99.12 [Amended]

8. Section 99.12 is amended by removing in paragraph (a) the commas after ``inspect'' and after ``review'' and by adding after the word ``inspect'' the word ``and'' and by revising the authority citation to read as follows:

(Authority: 20 U.S.C. 1232g(a)(1)(A), (B), (C), and (D))

Sec. 99.20 [Amended]

9. Section 99.20 is amended by removing in paragraph (a) the words ``or other rights''.

Sec. 99.21 [Amended]

10. Section 99.21 is amended by removing in paragraphs (a), (b)(1), and (b)(2) the words ``or other''.

11. Section 99.31 is amended by redesignating paragraph (a)(6)(iii) as paragraph (a)(6)(iv), by adding a new paragraph (a)(6)(iii) and by revising paragraphs (a)(5)(i) and (a)(9) and the authority citation to read as follows:

Sec. 99.31 Under what conditions is prior consent not required to

disclose information?

(a) * * *

(5)(i) The disclosure is to State and local officials or authorities to whom this information is specifically--

(A) Allowed to be reported or disclosed pursuant to State statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or

(B) Allowed to be reported or disclosed pursuant to State statute adopted after November 19, 1974, subject to the requirements of Sec. 99.38.

* * * * *

(6) * * *

(iii) If this Office determines that a third party outside the educational agency or institution to whom information is disclosed under this paragraph (a)(6) violates paragraph (a)(6)(ii)(B) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

* * * * *

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance unless the disclosure is in compliance with--

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(B) Any other subpoena issued for a law enforcement purpose and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

(iii) If the educational agency or institution initiates legal action against a parent or student and has complied with paragraph (a)(9)(ii) of this section, it may disclose education records to the court without a court order or subpoena.

* * * * *

(Authority: 20 U.S.C. 1232g (a)(5)(A), (b)(1), (b)(2), (b)(4)(B), and (f)).

12. Section 99.32 is amended by removing the word ``or'' following paragraph (d)(3), replacing the period at the end of paragraph (d)(4) with a semicolon and adding the word ``or'' after the semicolon, adding a new paragraph (d)(5), and revising the authority citation to read as follows:

Sec. 99.32 What recordkeeping requirements exist concerning requests and disclosures?

* * * * *

(d) * * *

(5) A party seeking or receiving the records as directed by a Federal grand jury or other law enforcement subpoena and the issuing court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

(Authority: 20 U.S.C. 1232g (b)(1) and (b)(4)(A))

13. Section 99.33 is amended by revising paragraphs (c) and (d) and by adding a new paragraph (e) to read as follows:

Sec. 99.33 What limitations apply to the redisclosure of information?

* * * * *

(c) Paragraph (a) of this section does not apply to disclosures made pursuant to court orders or lawfully issued subpoenas under Sec. 99.31(a)(9), to disclosures of directory information under Sec. 99.31(a)(11), or to disclosures to a parent or student under Sec. 99.31(a)(12).

(d) Except for disclosures under Sec. 99.31(a)(9), (11), and (12), an educational agency or institution shall inform a party to whom disclosure is made of the requirements of this section.

(e) If this Office determines that a third party improperly rediscloses personally identifiable information from education records in violation of Sec. 99.33(a) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

14. Section 99.34(a)(1)(ii) is amended by removing the word ``policy'' and adding, in its place, the words ``annual notification''.

15. Section 99.36 is amended by revising paragraph (b), adding paragraph (c) and revising the authority citation to read as follows:

Sec. 99.36 What conditions apply to disclosure of information in health and safety emergencies?

* * * * *

(b) Nothing in this Act or this part shall prevent an educational agency or institution from--

(1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community;

(2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or

(3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools that have been determined to have legitimate

[[Page 10669]]

educational interests in the behavior of the student.

(c) Paragraphs (a) and (b) of this section will be strictly construed.

(Authority: 20 U.S.C. 1232g (b)(1)(I) and (h))

16. A new Sec. 99.38 is added to subpart D to read as follows:

Sec. 99.38 What conditions apply to disclosure of information as permitted by State statute adopted after November 19, 1974 concerning the juvenile justice system?

(a) If reporting or disclosure allowed by State statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under Sec. 99.31(a)(5)(i)(B).

(b) The officials and authorities to whom the records are disclosed shall certify in writing to the educational agency or institution that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student.

(Authority: 20 U.S.C. 1232g(b)(1)(J))

Sec. 99.63 [Amended]

17. Section 99.63 is amended by removing the word ``person'' and adding, in its place, the words ``parent or eligible student''.
[FR Doc. 96-6034 Filed 3-13-96; 8:45 am]
BILLING CODE 4000-01-P

Section L

SECTION 504 of the REHABILITATION ACT

Regulations Concerning Education Under §504 of the Rehabilitation Act

34 CFR Part 104, Subparts A, C and D

Nondiscrimination On The Basis Of Handicap In Programs And Activities Receiving Or Benefiting From Federal Financial Assistance

---

Subpart A—General Provisions

§104.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§104.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Education and to each program or activity that receives or benefits from such assistance.

§104.3 Definitions.

As used in this part, the term:

(a) "The Act" means the Rehabilitation Act of 1973, Pub. L. 93–112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93–516, 29 U.S.C. 794.

(b) "Section 504" means section 504 of the Act.

(c) "Education of the Handicapped Act" means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94–142, 20 U.S.C. 1401 et seq.

(d) "Department" means the Department of Education.

(e) "Assistant Secretary" means the Assistant Secretary for Civil Rights of the Department of Education.

(f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) "Applicant for assistance" means one who Submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or (3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) "Handicapped person."

(1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito–urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(l) "Handicap" means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

§104.4 Discrimination prohibited.

(a). General. No qualified handicapped person shall. on the basis of handicap. be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

(b) Discriminatory actions prohibited. (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

©1993, EDLAW,Inc. , all rights reserved. Reproduced by permission.

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients' program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) Programs limited by Federal law. The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

§104.5 Assurances required.

(a) Assurances. An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Assistant Secretary, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) Duration of obligation. (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) Covenants. (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure non–discrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for an other purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Assistant Secretary may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§104.6 Remedial action, voluntary action, and self–evaluation.

(a) Remedial action. (1) If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Assistant Secretary, where appropriate, may require either or both recipients to take remedial action.

(3) The Assistant Secretary may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

(b) Voluntary action. A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) Self–evaluation. (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the require-

©1993, EDLAW,Inc.

ments of this part; and (iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Assistant Secretary upon request: (i) A list of the interested persons consulted, (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

§104.7 Designation of responsible employee and adoption of grievance procedures.

(a) Designation of responsible employee. A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) Adoption of grievance procedures. A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

§104.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to §104.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§104.9 Administrative requirements for small recipients.

The Assistant Secretary may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with Sections 104.7 and 104.8, in whole or in part, when the Assistant Secretary finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§104.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart C – Program Accessibility

§104.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§104.22 Existing facilities.

(a) Program accessibility. A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) Methods. A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of §104.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(c) Small health, welfare, or other social service providers. If a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

(d) Time period. A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(e) Transition plan. In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period of the transition plan is longer than one year, identify the steps of that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) Notice. The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or

©1993, EDLAW, Inc.

hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

§104.23 New construction.

(a) Design and construction. Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) Alteration. Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) American National Standards Institute accessibility standards. Design, construction, or alteration of facilities in conformance with the – American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by the American National Standards Institute, Inc. (ANSI A117.1-1961 (R1971)), which is incorporated by reference in this part, shall constitute compliance with paragraphs (a) and (b) of this section. Departures from particular requirements of those standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided. Incorporation by reference provisions approved by the Director of the Federal Register, May 27, 1975. Incorporated documents are on file at the Office of the Federal Register. Copies of the standards are obtainable from American National Standards Institute, Inc., 1430 Broadway, New York, N.Y. 10018.

Subpart D – Preschool, Elementary, and Secondary Education

§104.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§104.32 Location and notification.

A recipient that operates a public elementary or secondary education program shall annually:

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

§104.33 Free appropriate public education.

(a) General. A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) Appropriate education. (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§104.34, 104.35, and 104.36.

(2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person in or refer such person to a program other than the one that it operates as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) Free education – (1) General. For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) Transportation. If a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the program operated by the recipient.

(3) Residential placement. If placement in a public or private residential program is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the program, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) Placement of handicapped persons by parents. If a recipient has made available, in conformance with the requirements of this section and §104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made such a program available or otherwise regarding the question of financial responsibility are subject to the due process procedures of §104.36.

(d) Compliance. A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

§104.34 Educational setting.

(a) Academic setting. A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) Nonacademic settings. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in §104.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

©1993, EDLAW,Inc.

(c) Comparable facilities. If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

§104.35 Evaluation and placement.

(a) Preplacement evaluation. A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

(b) Evaluation procedures. A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) Placement procedures. In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with §104.34.

(d) Reevaluation. A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

§101.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

§104.37 Nonacademic services.

(a) General. (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) Counseling services. A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) Physical education and athletics. (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities. (2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of §104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

§104.38 Preschool and adult education programs.

A recipient to which this subpart applies that operates a preschool education or day care program or activity or an adult education program or activity may not, on the basis of handicap, exclude qualified handicapped persons from the program or activity and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity.

§104.39 Private education programs.

(a) A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided an appropriate education, as defined in §104.33(b)(1), within the recipient's program.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies shall operate special education programs shall operate such programs in accordance with the provisions of Sections 104.35 and 104.36. Each recipient to which this section applies is subject to the provisions of Sections 104.34, 104.37, and 104.38.

©1993, EDLAW,Inc.

BEST COPY AVAILABLE

Section M

SPECIAL EDUCATION COURT CASES

PERMISSION TO REPRINT

Reprinted with permission from LRP Publication. Copyright by LRP Publications, 747 Dresher Road, PO Box 980, Horsham, PA. 19044-0980. All rights reserved. For more information on products publishes by LRP Publication, please call - 1-800-341-7874 ext. 275.

List of Court Cases

Board of Education of the City School District of the City of New York, 21 IDELR 265 (SEA 1994)

Board of Education of Hendrick Hudson Central School District v.Rowley, 458 U.S. 176, 102 S. Ct. 3034, L. Ed. 690 (1982)

Clyde K. ex rel. Ryan K. v. Puyallup School District 35 F.3d 1396 (9th Circuit 1994)

Florence County School District Four v. Carter, 114 S. Ct.361 (1993)

Honig v. Doe, 108 S. Ct. 592, 98 L. Ed. 2d (1988)

Irving Independent School District v. Tatro, 104 S. Ct. 3371, 82 L. Ed. 2d. 664 (1984)

Johnson v. Independent School District No. 4, 921 F. 2d 1022 (10th Circuit 1990)

Light v. Parkway C-2 School District, 41 F. 3d 1223 (8th Circuit 1994)

Neely v. Rutherford County School District (6th Circuit 1995)

OSEP Discipline Memorandum 95-16, 22 IDELR 531 (1995)

Sacramento City Unified School District, Board of Education v. Rachel H. by Holland, 4 F. 3d 1398 (9th Circuit 1994)

W.G. v. Board of Trustees, 960 F. 2d 1479 (9th Circuit 1992)

21 IDELR 265

Board of Educ. of the City Sch. Dist. of the City of N.Y.

State Educational Agency, New York

JUNE 7 1994

Board of Education of the City School District of the City of New York.

No. 94-11

* Due Process Hearings, Scope of Hearing Officer's Authority

* Appeals to State Educational Agency, Scope of Review

* Personnel, Regular Education Teachers

* Personnel, Special Education Teachers/Instructors
* Individualized Education Program (IEP), Participants in/Procedures for

IEP Meeting

* ASSISTIVE TECHNOLOGY DEVICES/SERVICES

* Free Appropriate Public Education (FAPE), Right to FAPE

* Learning Disability, In General

* Related Services, Auxiliary Aids

* Reimbursement to Parents, Related Services

Summary

A 15-year-old student with a learning disability could not write without the assistance of a computer. The board's committee on special education offered to provide the student with the use of a computer in the classroom, to be used in conjunction with his family's home computer. The student's parent requested that he receive a lap top computer, and an impartial hearing officer (IHO) directed the board to provide him with this equipment on a 12-month basis until he reached the age of 21 or graduated.

HELD: for the board.

Initially, the state review officer found that the IHO exceeded her authority when she determined the student's educational needs for the years beyond the IEP for the school year in question.

Moreover, the board's committee meeting was not properly constituted and the IEP it proposed was invalid, due to the teacher's absence from this proceeding. Nonetheless, the state hearing officer found no evidence that a lap top computer was required in accordance with the IDEA or Section 504 in order for the student to benefit from his instructional program. Nor did the student's use of an existing family computer conflict with the requirement that special education and related services be provided at no cost to the parent. Finally, the parent was not entitled to reimbursement for expenditures on the computer and a printer, since she failed to show that the services offered by the board were inadequate.

Counsel for Board: Lawrence E. Becker, Esq., Roslyn Z. Roth, Esq., of counsel.

Counsel for Parent: Advocates for Children of New York, Inc., Dorothy Wendel, Esq. of counsel.

State Review Officer: Claudio R. Prieto.

Decision

Petitioner, the Board of Education of the City School District of the City of New York, appeals from the decision of an impartial hearing officer which directed petitioner to provide respondent's 15-year-old child with a lap top computer, monitor and printer (hereinafter "lap top"), for the child's exclusive use on a 12-month basis until the child attains 21 years of age or graduates from high school. The appeal must be sustained.

Respondent's child is classified as learning disabled. There is a significant difference between the child's verbal and performance IQ scores, and he has significant deficits in his fine motor and visual-motor integration skills, which are manifested in his inability to write at a level commensurate with his age. The child's classification is not in dispute, nor is his placement. The record reveals that the child has attended the Churchill School since the 1987-88 school year, when he was in the third grade. He repeated the sixth grade in the Churchill School, and is presently in the eighth grade. The Churchill School is a private school which has been approved by the State Education Department to provide instruction to children with disabilities. Respondent has contracted with the Churchill School for the child's education. In addition to special education, the child has been provided with speech/language therapy.

The record further reveals that the child has received occupational therapy three times per week as part of his educational program for the last seven years. Although occupational therapy was initially provided to assist the child in developing daily living skills like buttoning, the focus of the child's therapy has shifted to developing his communication skills, including handwriting and the use of a computer. His occupational therapist reported in June, 1993 that the child's speed in copying sentences had improved, but his handwriting was largely illegible. However, the occupational therapist reported that the child's typing skills had improved, and that he could type 12 words per minute.

In an end of the year report for the 1992-93 school year, the Churchill School reported that the child had achieved academic success in each of his courses. However, the child's language arts teacher reported that writing remained a laborious task for the child, and that he continued to have difficulty with spelling and vocabulary, in part because of his writing difficulty. The child's social studies teacher reported that the child tended to avoid written work, and opined that typing skills would be invaluable to the child. During the 1992-93 school year, the child was enrolled in a computer course in the Churchill School, in which the students reportedly used standard computers to acquire specific word processing skills.

In the Spring of 1993, respondent, who is the child's parent, discussed the child's use of computers with one of the child's teachers, who reportedly recommended that the child have a lap top. By letter dated October 1, 1993, respondent asked the principal of the Churchill School to support respondent's request to respondent's committee on special education (CSE) for a lap top for the child. On October 20, 1993, respondent asked the principal to solicit written statements in support of his request for a lap top from the staff of the Churchill School. At the principal's direction, written statements were prepared by the child's teacher, his occupational therapist, and his counselor, as well as the computer coordinator for the Churchill School. Each of the individuals recommended that the child have access to a lap top, in order to do his written work. Respondent submitted the written statements to the CSE.

On November 15, 1993, respondent met with respondent's CSE, which revised the child's individualized program (IEP) by listing a specific model of lap top as a special equipment/adaptive device needed by the child (see 8 NYCRR 200.4 [c][2][vi]).1 However, the child's IEP goals were not revised to reflect his use of a lap top. The lap top was added to the child's IEP with a written notation that the child:

> . . .has a history of severe visual-motor dysfunction for which

> OT has been received for seven years. Only with the use computer (sic) can he take notes and produce legible academic work including in mathematics. Lack of such equipment seriously impedes academic progress.

On November 30, 1993, the CSE began the child's triennial evaluation by having the child observed in the Churchill School by one of petitioner's psychologists. The psychologist, who observed the child in a mathematics class, reported that the child frequently responded to the teacher, but his responses were more inappropriate than those of his peers. However, the psychologist further reported that the child appeared to grasp the information being presented in class, and that the child's peers accommodated his idiosyncracies.

On January 4, 1994, respondent requested that an impartial hearing be held, because the child had not been provided with a lap top as the CSE had recommended. However, he subsequently agreed to defer his request for a hearing, pending the completion of the child's triennial evaluation. In the child's triennial psychological evaluation, which was completed on January 11, 1994, his verbal IQ score was reported to be 102, while his performance IQ score was reported to be 54. The child's full scale IQ score was reported to be 77. The psychologist who evaluated the child reported that the child's greatest strength in the verbal area was in his ability to acquire and retain information, while his greatest difficulties were in mathematical computation and short-term memory. In the nonverbal area, the child exhibited weakness in his fine motor movements, visual sequencing, visual-spatial analysis and organizational skills. The child's performance on certain sub-tests in the non-verbal area was significantly lower than recorded in prior psychological evaluations in 1985 and 1990. The child's perceptual motor skills were reported to be at an age equivalent of 6 to 61/2 years, although the child was 14 years old. The psychologist opined that the child had quite limited visual memory. The psychologist, who described the child as somewhat constricted emotionally, further opined that the child felt bad about his inability to manipulate the environment through his body and recommended that counseling be considered for the child.

In an educational evaluation, which was also completed in January, 1994, the child achieved grade equivalents of 8.3 in reading comprehension, 7.5 in reading decoding, 2.9 in spelling, 3.5 in math computation and 4.9 in math application. The child's writing skills are reported to be at approximately the fourth grade level, with particular deficits in his spelling, punctuation, and capitalization. At the time of the child's educational evaluation, he was in the eighth grade.

In a letter to the CSE chairperson dated January 11, 1994, the principal of the Churchill School reported that, after reviewing the child's amended IEP, she wished to advise the CSE that the Churchill School could not provide a lap top for the child, but would provide him with ready access to a computer in his classroom. She asserted that the Churchill School could address the child's IEP goal of becoming proficient in using a computer, and would assist the child in taking notes by providing him with computer disks or hard copies of notes and work produced in class. The principal requested that the CSE review its recommendation that the child have access to a lap top, or in the alternative, that the CSE arrange another placement for the child.

On January 28, 1994, the CSE conducted its triennial review of the child. The CSE recommended that the child remain classified as learning disabled and continue to attend the Churchill School. The CSE also recommended that the child continue to have test modifications, including having his test answers recorded in any manner. The CSE further recommended that the child receive speech/language therapy twice per week and occupational therapy three times per week. The CSE did not explicitly recommend that the child receive counseling, as its psychologist had recommended, but it nevertheless included an annual goal and short-term objectives for counseling. The child's IEP which was prepared at the January 28, 1994 meeting did not list any specialized equipment/adaptive device required by the child. The IEP included in a description of other programs and services which the CSE had considered the lap top which had been listed in the child's prior IEP. The CSE's rationale for not recommending a lap top was that the Churchill School had represented that it would provide the child with the use of a computer in the classroom to take tests, prepare assignments and to take notes, and would provide him with hard copies of notes or class work, or computer disks of such material for his use at home on a compatible computer.

The record does not reveal whether respondent requested a hearing to review the January 28, 1994 CSE recommendation. However at a hearing which was held on February 17, 1994, the issue was the CSE's January recommendation, rather than petitioner's failure to implement the CSE's November recommendation. A psychologist representing the CSE testified that the CSE had relied upon the letter of the principal of the Churchill School to the CSE chairperson in not recommending that the child have the use of a lap top, because the Churchill School could adequately meet the child's educational needs without his use of a lap top. In her testimony, the Churchill School principal reiterated her opinion that the Churchill School could meet the child's educational needs without a lap top, but asserted that the Churchill School would train the child to use a lap top if the Board of Education provided the device. The child's teacher for the 1993-94 school year testified that there were two computers available for use by the nine children in her classroom. The teacher also testified that the child required access to a computer, because of his deficient writing skills, but that he did not require a lap top to meet his needs. She further testified that the child did all of his written work on a computer, and that he was able to prepare outlines of written material without difficulty on the computer. With regard to outlining topics which were to be orally presented in school, the child's teacher testified that she would reposition a computer in class, so that the child could sit with his classmates during oral presentations.

In a decision dated March 15, 1994, the hearing officer held that the CSE had failed to meet its burden of proof with regard to the appropriateness of its recommendation that the child not be provided with a lap top. The hearing officer premised her holding upon findings that the child could not write without the assistance of a computer, and that providing the child with access to a standard personal computer in his classroom would not meet his unique needs. The hearing officer also held that the CSE's failure to recommend that the child be provided with a lap top denied the child an opportunity to reach the same level of achievement as his non-disabled peers, in violation of Section 504 of the Rehabilitation Act of 1993 (29 USC 794). The CSE was directed by the hearing officer to amend the specialized equipment portion of the child's IEP to provide for the child's use of a lap top, and petitioner was directed to purchase such equipment. The hearing officer further directed that a lap top shall be available to the child for his exclusive use during the school year and the summer months, until the child becomes 21 or graduates from high school.

Initially, I find that the hearing officer exceeded her jurisdiction by purporting to determine the child's educational needs for the next 6 years or until his graduation from high school. Federal and State regulations require that a CSE review each child's educational program at least once a year (34 CFR 300.343[d]; 8 NYCRR 200.4[e]), and re-evaluate each child at least once every three years (34 CFR 300.534[b]; 8 NYCRR 200.4[e][4]). As part of each annual review, a CSE prepares the child's IEP which details the educational program, including related services and necessary specialized equipment, to be provided to the child during the next 12
months. At an impartial hearing, it is the hearing officer's responsibility to determine the appropriateness of the program and services set forth in the child's IEP for the year during which the IEP will be in effect. The IEP which was before the hearing officer in this instance was intended to be in effect from January through June 1994, and in any event, would not have been valid beyond January 1995. Consequently, the hearing officer's review should have been limited to the IEP which was before her, and my review will be limited to such IEP. In view of the testimony of the CSE psychologist that the CSE would meet in May, 1994 to

prepare the child's IEP for the 1994-1995 school year, I further find that the hearing officer was precluded from determining what, if any, need the child had for a lap top during the summer of 1994, which is a matter for the child's 1994-95 IEP.

With regard to appropriateness of the educational services provided to the child by petitioner during the 1993-94 school year, there is a threshold issue which must be addressed. Section 4402(1)(b)(1) of the Education Law and 34 CFR 300.342(a)(2) require that a child's teacher participate in CSE meetings in which changes to the child's IEP are to be considered. Although a board of education may, under New York State law, dispense with the attendance of the school physician at certain CSE meetings, it may not dispense with the attendance of the child's teacher (Application of a Child with a Disability, Appeal No. 93-17). The child's IEP developed at the January 28, 1994 CSE meeting lists the participants in the meeting. The child's teacher in the Churchill School did not participate in person in the CSE meeting, and there is no evidence that she participated by telephone conference as is permitted by Federal regulation (34 CFR 300.348[a][2]). Notwithstanding the fact that a representative of the Churchill School, its principal, did participate in the January 28, 1994 CSE meeting, I am constrained to find that the CSE was not properly constituted, and that the IEP developed at such meeting is invalid (Application of a Child with a Disability, Appeal No. 93-17; Application of a Child with a Disability, Appeal No. 93- 11; Application of a Child with a Handicapping Condition, Appeal No. 92-31).

Although a remand of the matter to the CSE to develop a new IEP may be the appropriate remedy in some instances (Application of a Child with a Handicapping Condition, Appeal No. 92-9), it is not appropriate here, where the parties have no disagreement except for the issue of a lap top, and the school year at issue is virtually completed. The record reveals that the child will not, because of his grade level, be eligible to attend the Churchill School during the 1994-95 school year. The appropriateness of the lap top for the child during the 1994-95 and subsequent school years is not an issue in this proceeding. However, the parties have a right to a determination as to petitioner's responsibility to provide a lap top during the 1993-94 school year, provided that there is adequate record for doing so. In view of the fact that the child's teacher testified at the hearing in this proceeding, and that both parties had an opportunity to present relevant information in support of their respective positions, I find that there is an adequate record to determine the issue of providing a lap top to the child during the 1993-94 school year. Consequently, I will render a decision on this issue.

Petitioner asserts that the hearing officer erred by applying an incorrect standard in determining whether the CSE had recommended an appropriate program for the child. A board of education bears the burden of establishing the appropriateness of the program which its CSE has recommended (Matter of Handicapped Child; 22 Ed. Dept. Rep. 487; Application of a Child with a Handicapping Condition, Appeal No. 92-7; Application of a Child with a Disability, Appeal No. 93-9). To meet its burden, a board of education must demonstrate that the recommended program is reasonably calculated to allow the child to receive educational benefits (Bd. of Ed. Hendrick Hudson CSD v. Rowley, 458 U.S. 176), and that the recommended program is the least restrictive environment for the child (34 CFR 300.550[b]; 8 NYCRR 200.6[a][1]).

An appropriate program begins with an IEP which accurately reflects the results of evaluations to identify the child's needs, provides for the use of appropriate special education services to address the child's special education needs, and establishes annual goals and short-term instructional objectives which arc related to the child's educational deficits (Application of a Child with a Disability, Appeal No. 93-9; Application of a Child with a Disability, Appeal No. 93-12). In this instance, the issue is whether the child's IEP provides for the use of appropriate special education services to address his special education needs. Petitioner contends that the child, while requiring the use of a regular computer, does not require a lap top in order to benefit from his program of special education. Respondent asserts that a lap top computer is necessary, and that the use of a regular computer in school would be insufficient, for his son to benefit from his special education program.

Petitioner is obligated to provide the child with a free appropriate public education, which may include access to specialized equipment such as a computer. Federal regulation requires that a board of education provide a child with assistive technology devices, if the devices are required as part of the child's special education or related services, or supplementary aids and services necessary for the child to be educated in the least restrictive environment (34 CFR 300.308). An assistive technology device is defined in Federal regulation as:

> . . .any item, piece of equipment, or product system. . .that is used to increase, maintain, or improve the functional capabilities of children with disabilities (34 CFR 300.5)

The U.S. Department of Education has opined that any assistive technology device which a child requires must be listed in the child's IEP (20 IDELR 1216). State regulation requires that a child's IEP must describe any specialized equipment and adaptive devices needed for the child to benefit from education (8 NYCRR 200.4[c][2][vii]). Although the parties disagree about the particular kind of assistive technology device to be provided for the child's use, there is no disagreement that the child requires the assistance of a computer to facilitate his written expression.

Indeed, I find that the record amply demonstrates that the child requires the use of a computer to compensate for his fine motor and visual-motor deficits and to enable him to benefit from education. I further find that the CSE erred by not describing the specialized equipment needed by the child in the requisite portion of his IEP. However, the CSE's omission of that information from the IEP is not dispositive of the issues presented in this appeal.

The central issue in this appeal is whether the child requires the assistance of a lap top, rather than a regular computer, in order to receive a meaningful benefit from his instructional program (Application of a Child with a Handicapping Condition, Appeal No. 90-13). The child's teacher testified that the child already does all of his written work on computers. The Churchill School has offered to assure the child access to a personal computer in his classroom, on which the child would have the opportunity to take tests, complete assignments and prepare notes. Nevertheless, respondent asserts the CSE's recommendation is not reasonably calculated to enable the child to receive educational benefits without the use of a lap top (cf. Rowley, supra). Respondent contends that the child cannot be making reasonable progress in school, because the disparity between the child's verbal and performance IQ scores has increased and his full scale IQ score has decreased, since the child's prior triennial evaluation. However, there is no expert testimony or other evidence in the record which would afford a basis for the inference that the decline in the child's IQ scores is attributable to an alleged inability of the child to benefit from his educational program, or conversely, that the use of a lap top would enhance the child's IQ scores. The child has significant deficits in his educational achievement which are linked to his disabling condition. However, the child's reading comprehension was at an appropriate grade level in January, 1994. Furthermore, the Churchill School's end of the year report for the 1992-93 school year established that the child has made satisfactory academic progress.

One means of ascertaining whether an assistive technology device is necessary for a child to derive a meaningful benefit from his or her educational program is to determine if the device is required in order for the child to achieve his or her IEP goals (Application of a Child with a Disability, Appeal No. 93-33). Respondent asserts that the CSE's recommendation to provide the child with access to a computer in class will not address all of the child's language arts, or any of his social and emotional, goals. I disagree. The child's IEP reveals that the child will use a computer to compensate for his deficits in written expression and assist him in meeting his language arts goals which are dependent upon having adequate written expression. The child has two social and emotional goals in his IEP. These are to increase his sense of ability and strength to gain a more realistic sense of himself, and to increase his awareness of anxiety. In one of the letters submitted by respondent to the CSE, a Churchill School psychologist opined that the child's deficits in coordination and fine motor skills had negatively affected his self-esteem, and caused the child to become more verbally and physically aggressive. The psychologist further opined that if the child could reduce the extent of his fine motor difficulties by using computers, he could focus upon more appropriate social skills, which would also enable him to improve his self-esteem. However, the Churchill School psychologist's opinion does not afford a basis for concluding that the child requires a lap top, rather than the computers available in his classroom, in order to achieve his social and emotional IEP goals.

At the hearing, the school psychologist who was a member of the CSE testified that a lap top was not necessary for the child. Responding to the hearing officer's question about whether the CSE had adequately addressed the issue of the child's low self-esteem, the CSE's school psychologist opined that the child's feelings of inadequacy in manipulating the environment through his body related to the fact that the child is physically weak, rather than how the child feels about learning. She further opined that providing the child with a lap top would not change how the child sees himself, but conceded that the child might feel that he was more a part of the class with a lap top. Nevertheless, the school psychologist testified that the child's needs were being met in the Churchill School, where the child was receiving counseling to address his social and emotional needs, notwithstanding the CSE's failure to list counseling as a related service in the child's IEP (cf. 8 NYCRR 200.4[c][2][vi]).

In her decision finding that the petitioner was required to provide the child with a lap top, the hearing officer relied upon the four brief statements written by the Churchill School staff at respondent's request. Of the four individuals who wrote the statements, only the child's teacher testified at the hearing. In her written statement, the teacher had asserted that the child could do a much better job with the lap top, which would optimize his performance and lessen his anxiety. However, the teacher testified that her letter had been written to assist respondent, and that the child did not require a lap top to meet his educational needs. I find that the written statements of the other three Churchill School staff members also do not afford a basis for concluding that the child requires a lap top to derive a meaningful benefit from his educational program in the Churchill School in the 1993-94 school year.

Respondent asserts that the hearing officer correctly found that the program recommended by the CSE denied the child a free appropriate public education because it required the child to complete homework assignments on a compatible computer owned by petitioner. The record does not reveal the nature or extent of the child's written homework, which is especially significant in view of the representation by the Churchill School that the child could use a computer in school to complete homework and other tasks. However, even if the child completes written homework assignments on a computer at home, it does not follow that the child has been denied a free appropriate public education. In relevant part, Federal regulation defines a free appropriate public education as:

> . . .special education and related service that. . .are provided at public expense, under public supervision and direction, and without charge.. . . (34 CFR 300.8)

States and school districts may use whatever public and private sources of support which are available to provide a free appropriate public education (34 CFR 300.301). I find that there is no basis in the record for finding that the child's use of an existing family computer conflicts with the regulatory requirement that special education and related services be provided without charge to the parent.

Upon the record before me, I find that the child can derive a meaningful benefit from his instructional program, including the achievement of his IEP goals, without the assistance of a lap top. Consequently, I further find that petitioner is not required pursuant to either the Individuals with Disabilities Education Act (20 USC 1400 et seq.) or Article 89 of the New York State Education Law to provide a lap top for the child's use during the 1993-94 school year.

The hearing officer also held that the petitioner was required by the provisions of Section 504 of the Rehabilitation Act of 1973 to provide the child with a lap top, because the child would otherwise be denied an equal opportunity to reach the same level of achievement as non-disabled children. Although the standard articulated by the hearing officer appears to have been taken from one portion of the Federal regulatory definition of discriminatory actions under Section 504 (see 34 CFR 104.4[b][2]), it is of questionable applicability in view of the regulatory definition of a free appropriate public education for Section 504 purposes (see 34 CFR 104.33). Indeed, the latter regulation expressly provides that implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act is one means of satisfying the parallel requirement of providing a free appropriate public education under Section 504 (34 CFR 104.33[b][2]). Respondent's reliance upon the provisions of 34 CFR 104.44(d) is misplaced, because that regulation by its terms, is limited to students in postsecondary educational institutions.

Having found that petitioner is not required to provide the child with a lap top under Individuals with Disabilities Education Act, I further find that it is not required to do so under Section 504.

Respondent requests that petitioner be ordered to reimburse him for his expenditures for a computer and printer which he purchased for the child. A board of education may be required to pay for educational services obtained by a parent, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parent's claim (School Committee of the Town of Burlington v. Department of Education, Massachusetts, 471 U.S. 359; Hiller v. Brunswick CSD, 687 F. Supp. 735 [N.D.N.Y., 1988]). In this instance, respondent did not raise the issue of reimbursement at the hearing, and there is no evidence in the record of such expenditures. However, even if I were to reach the merits of this issue (cf. Application of a Child with a Disability, Appeal No. 93-36), I would nevertheless be constrained to deny respondent's request because respondent cannot prevail on the first prong of the Burlington test, i.e. that the services offered by the board of education were inadequate.

THE APPEAL IS SUSTAINED.

IF IS ORDERED that the decision of the hearing officer is hereby annulled.

1 Although the record reveals that neither the parent member of the CSE nor the child's teacher attended the CSE meeting (cf. Section 4402[1][b][1] of the Education Law), the validity of the CSE's recommendation on November 15, 1993 is not at issue in this appeal, because respondent did not seek review of the recommendation, which was the subsequently superseded by another CSE recommendation which is the subject of this appeal.

102 S. Ct. 3034

Board of Educ. v. Rowley

BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, et al., v. ROWLEY, by her parents, ROWLEY et ux.,

No. 80-1002

U.S. Supreme Court

JUNE 28 1982

* Free Appropriate Public Education (FAPE), Definition Under Federal Law * Hearing Impairment, In General

* Practice and Procedure, Judicial Review

Summary

No. 80.-1002. Argued March 23, 1982-Decided June 28, 1982
The Education for All Handicapped Children Act of 1975 (Act) provides federal money to assist state and local agencies in educating handicapped children. To qualify for federal assistance, a State must demonstrate (through a detailed plan submitted for federal approval) that it has in effect a policy that assures all handicapped children the right to a "free appropriate public education," which must be tailored to the unique needs of the handicapped child by means of an "individualized educational program" (IEP). The IEP must be prepared (and reviewed at least annually) by school officials with participation by the child's parents or guardian. The Act also requires that a participating State provide specified administrative procedures by which the child's parents or guardian may challenge any change in the evaluation and education of the child. Any party aggrieved by the state administrative decisions is authorized to bring civil action in either a state court or a federal district court. Respondents-a child with only minimal residual hearing who had been furnished by school authorities with a special hearing aid for use in the classroom and who was to receive additional instruction form tutors, and the child's parents-filed suit in Federal District Court to review New York administrative proceedings that had upheld the school administrators' denial of the parents' request that the child also be provided a qualified sign-language interpreter in all of her academic classes. Entering judgment for respondents, the District Court found that although the child performed better than the average child in her class and was advancing easily from grade to grade, she was not performing as

well academically as she would without her handicap. Because of this disparity between the child's achievement and her potential, the court held that she was not receiving a "free appropriate public education," which the court defined as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." The Court of Appeals affirms.

Held:

1. The Act's requirements of a "free appropriate public education" is satisfied when the State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from the instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate grade levels used in the State's regular education, and must comport with the child's IEP, as formulated in accordance with the Act's requirements. If the child is being educated in regular classrooms, as here, the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. Pp. 9.27.

(a) This interpretation is supported by the definitions contained in the Act, as well as by other provisions imposing procedural requirements and setting forth statutory findings and priorities for States to follow in extending educational services to handicapped children. The Act's language contains no express substantive standard prescribing the level of education to be accorded handicapped children. Pp.9-12.

(b) The Act's legislative history shows that Congress sought to make public education available to handicapped children, but did not intend to impose upon the the States any greater substantive educational standard than is necessary to make such access to public education meaningful. The Act's intent was more to open the door of public education to handicapped children by means of specialized educational services than to guarantee any particular substantive level of education once inside. Pp.13.20.

(c) While Congress sought to provide assistance to the States in carrying out their constitutional responsibilities to provide equal protection of the laws, it did not intend to achieve strict equality of opportunity or services for handicapped and nonhandicapped children, but rather sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education. The Act does not require a State to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Pp. 21-23.

2. In suits brought under the Act's judicial-review provisions, a court must first determine whether the State has compiled with the statutory procedures. and must determine whether the individualized program developed through such procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. Pp. 27-31.

(a) Although the judicial-review provisions do not limit courts to ensuring that States have complied with the Act's procedural requirements, the Act emphasis on procedural safeguards demonstrates the legislative conviction that adequate compliance with prescribed procedures will in most cases assure much, if not all, of what Congress wished inthe way of substantive content in an IEP. Pp 27-30.

(b) The court must be careful, to avoid imposing their view of preferable educational methods upon the States. Once a court determines that the Act's requirements have been met, questions of methodology are for resolution by the States. Pp. 30-31.

3. Entrusting a child's education to state and local agencies does not leave the child without protection. As demonstrated by this case, parents and guardians will lack ardor in seeking to ensure that handicapped children receive all the benefits to which they are entitled by the Act. Pp.31-32.

4. The Act does not require the provision of a sign-language interpreter here. Neither of the courts below found that there had been a failure to comply with the Act's procedures, and the findings of neither court will support a conclusion that the child's educational program failed to comply with the substantive requirements of the Act. P.33.

632 F. 2d 945, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion, concurring in the judgment. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined.

Burger, C.J., and Brennan, White, Marshall, Blackmun, Powell,

Rehnquist, Stevens, O'Connor, JJ.

REHNQUIST, J.

Certiorari to the United States Court of Appeals For The Second

Circuit JUSTICE REHNQUIST delivered the opinion of the Court. This case presents a question of statutory interpretation Petitioners contend that the Court of Appeals and the District Court misconstrued the requirements imposed by the Congress upon States which receive federal funds under the Education for All Handicapped Children Act. We agree and reverse the judgment of the Court of Appeals.

I

The Education for All Handicapped Children Act of 1975 (Act), 20 U.S.C. 1401 et seq., provides federal money to assist state and local agencies in educating handicapped children, and conditions such funding upon a States compliance with extensive goals and procedures. The Act represents an ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' perception that a majority of handicapped in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to `drop out.'" H.R. Rep. No.94-332. p.2 (1975). The Acts evolution and major provisions shed light on the question of statutory interpretation which is at he heart of this case.

Congress first addressed the problem of education the handicapped in 1966 when it amended the Elementary and Secondary Education Act of 1965 to establish a grant program "for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects. . . for the education of handicapped children." Pub. L. No. 89-750, 161, 80 Stat.1204 (1966). That program was repealed in 1970 by the Education for the Handicapped Act, Pub. L. No. 91-230, 84 Star. 175, Part B of which established a grant program similar in purpose to the repealed legislation. Neither the 1966 nor 1970 legislation contained specific guidelines for state use of the grant money; both were aimed primarily at stimulating the States to develop educational resources and to train personnel for educating the handicapped.1

Dissatisfied with the progress being made under these earlier enactments, and spurred by two district court decisions holding that handicapped children should be given access to a public education,2 Congress in 1974 greatly increased federal funding for education of the handicapped and for the first time required recipient States to adopt "a goal of providing full educational opportunities to all handicapped children." Pub. L. 93-380, 88 Stat. 579, 583 (1974) (the 1974 statue). The 1974 statue was recognized as an interim measure only, adopted "in order to give the Congress an additional year in which to study what if any additional Federal assistance [was] required to enable the States to meet the needs of handicapped children." H.R. Rep. No. 94-332, supra, p.4. The ensuing year of study produced the Education for All Handicapped Children Act of 1975.

In order to qualify for federal financial assistance under the Act, a State must demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. 1412(1). That policy must be reflected in a state plan submitted to and approved by the Commissioner of Education,[3] 1413, which describes in detail the goals, programs, and timetables under which the State intends to educate handicapped children within its borders. 1412. 1413. States receiving money under the Act must provide education to the handicapped by priority, first "to handicapped children who are not receiving an education" and second "to handicapped children . . . with the most severe handicaps who are receiving an inadequate education," 1413(3), and to the maximum extent appropriate" must educate handicapped children "with children who are not handicapped." 1412(5).[4] The Act broadly defines "handicapped children" to include "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, [and] other health impaired children, [and] children with specific learning disabilities." 1401(1).[5]

The "free appropriate public education" required by the Act is tailored to the unique needs of the handicapped child by means of an 'individualized educational program" (IEP). 1401(18). The IEP, which is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child parents or guardian, and, where appropriate, the child, consists of a written document containing

"(A) a student of the present levels of educational performance of the child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such service, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved." 1401(19).

Local or regional educational agencies must review, and where appropriate revise, each child's IEP at least annually. 1404(a)(5). See also 1413(a)(11), 1414(a)(5).
In addition to the state plan and the IEP already described, the Act imposes extensive procedural requirements upon State receiving federal funds under its provisions. Parents or guardians of handicapped children must be notified of any proposed change in "the identification, evalutaion, or educational placement of the child or the provision of a free appropriate public education to the child," and must be permitted to being a complaint about "any matter relating to" such evaluation and education. 1415(b)(1)(D) and (E).6 Complaints brought by parents or guardians must be resolved at "an impartial due process hearing," and appeal to the State educational agency must be provided if the initial hearing is held at the local or regional level. 1415(B)(2) and (c)7 Thereafter, "[a] ny party aggrieved by the findings and decisions" of the state administrative hearing has "the right to bring a civil action with respect to the complaint . . .in any State court of competent jurisdiction or in a district court of the United Stated without regard to the amount in controversy." 1415(e)(2). Thus, although the Act leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, it imposes significant requirements to be followed in the discharge of that responsibility. Compliance is assured by provisions permitting the withholding of federal funds upon determination that a participating state or local agency has failed to satisfy the requirements of the Act, 1414(b)(A), 1416, and by the provision for judicial review. At present, all States except New Mexico receive federal funds under the portions of the Act at issue today. Brief for the United States as Amicus Curiae 2, n. 2.

II

This case arose in connection with the education of Amy Rowley, a deaf student at the Furnace Woods School in the Hendrick Hudson Central School District, Peekskill, New York. Amy has minimal residual hearing and is an excellent lipreader. During the year before she began attending furnace Woods, a meeting between her parents and school administrators resulted in a decision to place in a regular kindergarten class in order to determine waht supplement services would be necessary to her education. Several members of the school administration prepared for Amy's arrival by attending a course in sign-language interpretation, and a teletype machine was installed in the principal's office to facilitate communication with her parents who are also deaf.

At the end of the trial period it was determined that Amy should remain in the kindergarten class, but that she should be provided with an FM hearing aidwhich would amplifywords spoken into a wireless receiver by the teacher or fellow students during certain classroom activities. Amy sucessfully completed her kindergarten year.

As required by the Act, an IEP was prepared for Amy during the fall of her first-grade year.The IEP provided that Amy should be educated in a regular classroom at Furnace Woods, should continue to use the FM hearing aid, and should receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week. The Rowleys agreed with the IEP but insisted that Amy also be provided a qualified sign-language interpreter in all of her academic classes. Such an interpreter had been placed in Amy's kindergarten class for a two-week experimental period, but the interpreter had reported that Amy did not need his services at that time. The school administrators likewise concluded that Amy did not need such an interpreter in her first-grade classroom. they reached this conclusion after consulting the school district's committee on the Handicapped, which had received expert evidence from Amy's parents on the importance of a sign-language interpreter, received testimony from Amy's teacher and other persons familiar with her academic and social progress, and visited a class for the deaf.

When their request for an interpreter was denied, the Rowleys demanded and received a hearing before an independent examiner. After receiving evidence from both sides, the examiner agreed with the administrarors' determination that an interpreter was not necessry because "Amy was achieving educationaly, academically, and socially" without such assistance. App.to Pet. for Cert. F-22. The examiner's decision was affirmed on appeal by the New York Commissioner of Education on the basis of substantial evidence in the record. Id., at E-4. Pursuant to the Act's provision for judicial review, the Rowleys then brought an action in the United States District Court for the Southern District of New York, claiming that the administrators' denial of the sign-language interpreter constituted a denial of the "free appropriate public education" guaranteed by the Act.

The District Court found that Amy" is a remarkably well adjusted child" who interacts and communicates well with her classmates and has "developed an extraordinary rapport" with her teachers. 483 F. Supp, 528, 531. It also found that "she performs beter than the average child in her class and is advancing easily from grade to grade," id., at 534, but 'that she understands considerably less of what goes on in class than she would if she were not deaf" and thus "is not learning as much, or performing as well academically, as she would without her handicapp," id., at 532. This disparity between Amy's achievement and her potential led the court to decide that she was not receiving a "free appropriate public education" which the court defined as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." id., at 534. According to the District Court, such a standard "requires that the potential of the handicapped child be measured and compared to his or her performance, and that the remianing differential or 'shortfall' be compard to the shortfall experienced by nonhandicapped children.' Ibid. The District Court's definition arose from its assumption that the responsibility for "giv[ing] content to the requirement of an 'appropriate education'" had 'been left entirely to the federal courts and the hearing officers.' Id., at 533.8

A divided panel of the United States Court of Appeals for the Second Circuit affirmed. The Court of Appeals "agree[d] with the [D]istrict [C]our's conclusions of law," and held that its 'findings of fact [were] not clearly erroneous." 632 F. 2d 945, 947 (1980).

We granted certiorari to review the lower courts' interpretation of the Act. 45 U.S. ---- (1981). Such review requires us to consider two questions: What is meant by the Act's requirement of a "free appropriate public education"? And waht is the role of state and federal courts in exercising the review granted by 1415 of the Act? We consider these questions seperately.9

III

A

This is the first case in which this Court has been called upon to interpreter any provision of the Act. As noted previously, the District Court and Court of Appeals concluded that "[t]he Act itself does nor define 'appropriate education,'" 483 F. Supp., at 533, but leaves "to the courts and the hearing officers" the responsibility of "giv[ing] content to the requirement of an appropriate education." Ibid. see also 632 F. 2d, at 947. Petitioners contend that the definition of the phrase "free appropriate public education" used by the courts below overlooks the definition of the phrase actually found in the Act. Respondents agree that the Act defines "free appropriate public education," but contend that the statutory definition is not "functional" an thus "offers judges no guidance in their consideration of controversies incolving the 'identification, evaluation, or educational placement of the child or the provision of a free appropriate public education," Brief for Respondents 28. The United States, appearing as amicus curaie on behalf of respondents, states that '[a]though the Act includes definitions of 'free appropriate public education' and other related terms, the statutory definitions do not adequately explain what is meant by 'appropriate," Brief for United States as Amicus Curiae 13. We are loath to conclude that congress failed to offer any assistance in defining the meaning of the princiapl substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define "free appropriate public education":

"The term ' free appropriate public education' means special education and related services which (A) have been provided at public expenses, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." 1401(18) (emphasis added).

"Special education," as referred to in this definition, means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.' 1401(16). "Related services" are defined as "transportation, and such developmental, corective, and other supportive services...as may be required to assist a handicapped child to benefit from special education." 1401(17).10

Like many staturoty definitions, this one tends toward the cryptic rather than the comprehensive, but that is scarcely a reason for abandoning the quest for legislative intent. Whether or not the definition is "functional" one, as respondents contend it is not, it is the principal tool which congress has given us for parsing the critical phrase of the Act, we think more must be made of it than either respondents or the united States seems willing to admit.

According to the definitions contained in the Act, a "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to to permit the child "to benefit" from the instruction.

Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit form the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

Other portions of the statue also shed upon congressional intent. Congress found that of the roughly eight million handicapped children in the United States at the time of enactment, one million were "excluded entirely form the public school system" and more than half were receiving an inappropriate education. Note to 1401. In addition. as mentioned in Part I, the Act requires States to extend educational services first to those children who are receiving no education and second to those children who are receiving an "inadequate education." 1412(3). When these express stuatory findings and priorities are read together with the Act's extensive procedral requirements and its definition of "free appropriate public education" the face of the statute evinces a congressional intent to bring previously excluded handicapped children into public education systems of the States and to require the States to adopt procedures which would result in individualized consideration of and instruction for each child.

Noticeably absent from the language of the statue is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly the language of the statute contains no requirement like the one imposed by the lower courts--that States maximize the potential of handicapped children "commensurate with the opportunity provided to other children." 483 F. Supp., at 534. That standard was expounded by the District court without reference to the statutory definitions or even to the legislative history of the Act. Although we find the statutroy definition of :free appropriates public education" to be helpful in our interpretation of the Act, there remains the question of whether the legislative history indicates a congressional intent that such education meet some additional substantive standard. For an answer, we turn to that history.

B

(i)

As suggested in Part I, federal support for education of the handicapped is a fairly recent development. Before passage of the Act some States has passed laws to improve the educational services afford handicapped children,12 but many of these children were excluded completely form any form of public education or were left to fend for themselves in classrooms designed for education fo their nonhandicapped peers. The House Report begins by emphasising this exclusion and misplacement, noting that miilions of handicapped children "were either totally excluded form schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" H.R. Rep, No. 94-332, supra, at 2. See aslo S. Rep. No. 94-168, p. 8 (1975). One of the Act's two principal sponsors in the Senate urged its passage in similar terms:

"While much progress has been made in the last few years, we can take no solace in that progress until all handicapped children are, in fact, receiving an education. The most recent statistics provided by the Bureau of Education for the Handicapped estimate that ... 1.75 million handicapped children do not receive any educational services, and 2.5 million handicapped children are not receiving an appropriate education." 121 Cong. Rec. 1946 (1975) (remarks of Sen. Williams).

This concern, stressed repeatedly throughout the legislative history,13 confirms the impression conveyed by the language of statute: By passing the act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the states any greater substantive educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." S. Rep. no. 94-168, supra, at 11. thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

Both the House and the Senate reports attribute the impetus for the Act and its predecessors to two federal court judgments rendered in 1971 abd 1972. As the Senate Report states, passage of the act "followed a series of landmark court cases establishing in law the right to education for all handicapped children." S. Rep. No. 94-168, supra, at 6.14 The first case, Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (PARC), 334 F. Supp. 1257 (1971) 343 F. Supp. 279(ED pa 1972), was a suit on behalf of retarded children challenging the constitutionality of a Pennsylvania statue which acted to exclude them from public education and training. The case ended in a consent decree which enjoined the State from "den[ying] to any mentally retarded child access to a free public program of education and training." 334 F. Supp. at 1258 (emphasis added).

PARC was followed by Mills v. Board of Education of the District of Columbia, 343 F. Supp. 866 (DC 1972),a case in which the plaintiff handicapped children had been excluded from the District of Columbia public schools.the court judgment, quoted at page 6 of the Senate Report on the Act, provided.

> "[t]hat no [handicapped] child eligible for publicly supported education in the District of Columbia public schools shall be excluded from a regular school assignment by a Rule, policy, or practice of the Board of Education of the District of Columbia or its agents unless such child is provided (a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative." 348 F. Supp., at 878 (emphasis added).

Mills and PARC both held that handicapped children must be given access to an adequate, publicly supported education. Neither case purports to require any particular substantive level of education.15 Rather, like the language of the Act, the cases set forth extensive procedures to be followed in formulating personalized educational programs for handicapped children. See 348 F. Supp., at 878-883; 334 F. Supp., at 1258-1267.16 The fact that both PARC and Mills are discussed at length in the legislative reports suggest that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act. indeed, immediately after discussing these cases the Senate Report describes the 1974 statue as having "incorporated the major principles of the right to education cases." S. Rep. No 94-168, supra, at 8. Those principles in turn became the basis of the Act, which itself was designed to effectuate the purposes of the 1974 statue. H.R. Rep. No. 94-332, supra, at 5.18

That the Act imposes no clear obligation upon recipient States beyond the requirement that handicapped children receive some form of specialized education is perhaps best demonstrated by the fact that congress, in explaining the need for the Act, equated an "appropriate education" to the receipt of some specialized educational services. The Senate report states: '[T]he most recent statistics provided by the Bureau of education for the Handicapped estimate that of the more than 8 million children...with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving an appropriate education." S. Rep.No. 94-332, supra, at 8.19 This statement, which reveals congress' view that 3.9 million handicapped children were "receiving an appropriate education" in 1975, is followed immediately in the Senate Report by a table showing that 3.9 million handicapped children were "served " in 1975 and a slightly larger numbers were "unserved." A similar statement and table appear in the House report. H.R. Rep. No, 94-332 , supra, at 11-12.

It is evident form the legislative history that the characterization of handicapped children as "served" referred to children who were receiving some form of specialized educational services from the States, and that the characterization of children as "unserve" referred to those who were receiving no specialized educational services. for example, a letter sent to the United States Commissioner of Education by the House Committee on Education and Labor, signed by two kry sponsors of the Act in the House, asked th commissioner to identify the number of handicapped " children served" in each State. The letter asked for statistics on the number of children "being served" in various types of "special education program[s]" and the number of children who were not "receiving educational services." Hearing on S. 6 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 94th Cong. 1st Sess.,205-207 (1975).Similarly, Senator Randolph, one of the Act 's principal sponsors in the Senate, noted that roughly one-half of the handicapped children in the United States "are receiving special educational services. "Id., at 1.20 By characterizing the 3.9 million handicapped children who were "served" as children who were receiving an appropriate education," the Senate and House reports unmistakably disclose Congress' perception of the type of education required by the Act: an "appropriate education" is provided when personalized educational services are provided.[21]

(ii)

Respondents contend that "the goal of the Act is to provide each handicapped child with an equal educational opportunity." Brief for Respondents 35. We think,however, that the requirement that a State specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential "commensurate with the opportunity provided other children."

Respondents and the United States correctly note that Congress sought "to provide assistance to the States carrying out their responsibilties under...the Constitution of the United States to provide equal protection of the laws." S. Rep. No. 94-168, supra, at 13.[22] But we do not think that such statements imply a congressional intent to achieve: strict equality of opportunity or services.

The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance give less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether on is speaking of opportunities or services.

The legislative conception of the requirements of equal protection was undoubtedly informed by the two district court decisions referred to above. But cases such as Mills and PARC held simply that handicapped children may not be excluded from entirely public education. In Mills. the District Court said:

"If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom." 348 F Supp., at 876.

The PARC Court used similar language, saying "[i]t is the commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity..." 334 F. Supp., at 1260. The right of access to free public education enunciated by these cases is significantly different from any notion of absolute equality of opportunity regardless of capacity. To the extent the Congress might have looked further than these cases which are mentioned in the legislative history, at the time of enactment of the Act this Court has held at least twice that the Equal Protection Clause of the Fourteenth Amendment does not require States to expend equal financial resources on the education of each child. San Antonio School District v. Rodriguez 411 U.S. 1(1975); Mcinnis v. Shapiro, 238 F.Supp. 327 (ND Ill. 1968), aff'd sub nom, Mcinnis v. Ogilvie, 394 U.S. 322 (1969).

In explaining the need for federal legislation,the House Report noted that "no congressional legislation has required a precise guarantee for handicapped children, i.e a basic floor of opportunity that would bring into compliance all school districts with the constitutional right of equal protection with respect to handicapped children." H.R. Rep. No. 94-332, supra, at 14. Assuming that the Act was designed to fill the need identified in the House Report--that is, to provide a "basic floor of opportunity' consistent with equal protection--neither the Act nor its history persuasively demonstrate that Congress thought that equal protection required anything more than equal access. Therefore, Congress' desire to provide specialized educational services, even in furtherance of "equality," cannot be read as imposing any particular substantive educational standard upon the States.

The District Court and the Court of Appeals thus erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Desirable though that goal might be, it is not the standard that Congress imposed upon States which receive funding under the Act. Rather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education.

(iii)

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to public education only to have the handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such...supportive services...as may be required to assist a handicapped child to benefit from special education." 1401(17) (emphasis added). We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.23

The determination of when handicapped children are receiving sufficeint educational benefits to satisfy the requirements of the Act presents a more difficult problem. The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically form those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to the situation.

The Act requires participating States to educate handicapped children with nonhandicapped children whenever possible.24 When that "mainstreaming" preference of the Act has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit. Children who graduate form our public school systems are considered by our society to have been "educated" at least to the grade level they have completed, and access to an "education" for handicapped children is precisely what Congress sought to provide in the Act.25

C

When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirements by providing personalized instruction with sufficient support services to permit the child to benefit educationally form that instruction. Such instrcution and services must be provided at public expense, must meet the State's educational standards, must apprioximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and , if the child is being educated in the regular classrooms of the public education system, should be reseonably calculated to enalbe the child to achieve passing marks and advance from grade to grade.26

IV

A

As mentioned in Part I, the Act permits "[a]ny party aggrieved by the findings and decision" of the state administrative hearings "to bring a civil action "in" any State Court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." 1415(e)(2). The complaint, and therefore the civil action, may concern "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 1415(b)(1)(E). In reviewing the complaint , the Act provides that a court "shall receive the record of the [state] administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 1415(e)(2).

The parties disagree sharply over the meaning of these provisions, petitioners contending that courts are given only limited authority to review for state compliance with the Act,s procedural requirements and no power to review the substance of the state pogram, and respondents contending that the Act requires courts to exercise de novo review over state educational decisions and policies. We find petitioners' contention unpersuasive, for Congress expressly rejected provisions that would have so severly restricted the role of reviewing courts. In substituting the current language of the statue for language that would have have made state administative findings conclusive if supported by substantial evidence, the Conference Committee explained that courts were to make "independent decision[s] based on a preponderance of the evidence." S. Conf. Rep.No. 94-455, Supra, at 50. See also 121 Cong. Rec. 37416 (1975) remarks of Sen Williams).

But although we find that this grant of authority is broader than claimed by petitioners, we think the fact that it is found in 1415 of the Act, which is entitled "Procedural Safegaurds." is not without significance. when the elaborate and highly specific procedural safeguards embodied in 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g.1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Commissioner for approval, demonstrate the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Thus the provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the court to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings. And we find nothing in the Act to suggest that merely because Congress was rather sketchy in establishing substantive requirements, as opposed to procedural requirements for the preparation of an IEP, it intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself. In short, the statutory authorization to grant "such relief as the court determines is appropriate' cannot be read without reference to the obligations, largely procedural in nature, which are imposed upon recipient States by Congress.

Therefore, a court,s inquiry in suits brought under 1415(e)(2) is twofild. First, has the State compiled with the procedures set forth in the Act?27 And second, is the individualized educational program developed through the Act,s procedures reasonably calculated to enable the child to receive educational benefits?28 If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

B

In assuring that the requirements of the Act have been met, court must be careful to avoid imposing their view of preferable educational methods upon the States.29 The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of "acquiring and disseminating to teachers and administrators of programs for
handicapped children significant informaton derived form educational research, demonstration, and similar projects, and

[of] adopting, where appropriate, promising educational practices and materials." 1413(a)(3). In the face of such a clear statutory directive, it seems highly unlikely that congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to 1415(e)(2).30

We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." San Antonio School District v. Rodriguez, 411 U.S. 1, 42 (1973). We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of Education, but that the states receive funds to assist them in extending their educational systems to handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

V

Entrusting a child's education to state and local agencies does not leave the child without protection. congress sought to protect individual children by providing for parental involvement in the development of State plans and policies, supra, at 4-5 and n. 6, and in the formulation of the child's individual educational program. As the Senate Report states:

> "The Committee recognizes that in may instances the process of providing special edcuation and related services to handicapped children is not guaranteed to produce any particular outcome. By changing the language [of the provision relating to individulized educational program] to emphasize the process of parent and child involvement and to provide a written record of reasonable expectations, the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child."

S. Rep. No.94-168, supra, at 11-12. see also S. Conf. Rep. No. 94-445, p. 30 (1975); 45 CFR 121a.345 (1980).

As this very case demonstrates, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all the benefits to which they are entitled by the Act.31

IV

Applying these principles to the facts of this case, we conclude that the court of Appeals erred in affirming the decision of the District Court. Neither the District Court nor the Court of Appeals found that petitioners had failed to comply with the procedures of the Act, and the findings of neither court would support a conclusion that Amy's educational program failed to comply with the substantive requirements of the Act. On the contrary, the District Court found that the "evidence firmly establishes that Amy is receiving an 'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade." 483 F Supp., at 534. In light of this finding, and of the fact that Amy was receiving personalized instruction and related services calculated by the Furnace Woods school administrators to meet her educational needs, the lower courts should not have concluded that the Act requires the provision of a sign-language interpreter. Accordingly, the decision of the Court of appeals is reversed and the case is remanded for further proceedings consistent with this opinion.32

SO ORDERED.

JUSTICE BLACKBMUN, concurring in the judgment.

Although I reach the same result as the Court of the Education for All Handicapped Children Act differently. Congress unambiguously stated that it intended to "to take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity." S. Rep. No. 94-168, p. 9 (1975) (emphasis added). See also 20 U.S.C. 1412(2)(A)(i) (requiring States to establish plans with the 'goal of providing full educational opportunity to all handicapped children").

As I have observed before, "[i]t seems plain to me that Congress, in enacting [this statue], intended to do more than merely set out politically self-serving but essentially meaningless language about what the [handicapped] deserve at the hands of state...authorities." Pennhurst State School v. Halderman, 451 U.S. 1, 32(1981)(opinion concurring in part and concurring in judgment). The clarity of the legislative intent convinces me that the relevant question here is not, as the court says, whether Amy Rowley's individulaized education program was "reasonably calculated to enable [her] to receive educational benefits," ante, at 30, measured in part by whether or not she "achieve[s] passing marks and advance[s] form grade to grade," ante , at 27. Rathe, the question is whether Amy's program, viewed as a whole, offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her nonhandicapped classmates. This is a standard predicated on equal educational opportunity and equal access to the educational process, rather than upon Amy's achievement of any particular educational outcome. In answering this question, I believe that the District Court and the court of Appeals should have given greater deference than they did to the findings of the School District's impartial hearing officer and the State's Commissioner of Education, both of whom sustained petitioner's refusal to add sign-language interpreter to Amy's individualized education program. CF. 20 U.S.C. 1415(e)(2) (requiring reviewing court to "receive the records of the administrative proceeding " before granting relief). I would suggest further that those court focused too narrowly on the presence or absence of a particular service-a sign-language interpreter-rather than on the total package of services furnished to Amy by the School Board.

As the Court demonstrates, ante, at 6-7, petitioner Board has provided Amy Rowley considerably more than "a teacher with a loud voice." See post, at 4(dissenting opinion). By concentrating on whether Amy was "learning as much, or performing as well academically, as she would without her handicap," 483 F. Supp. 528, 532 (SDNY 1980), the District Court and the Court of Appeal paid too little attention to whether, on the entire record, respondent's individualized education program offered her an educational equal to that provided her nonhandicapped classmates. Because I believe that standard has been satisfied here, I agree that the judgment of the Court of Appeals should be reversed.

1 See S. Rep. No. 94-168, p. 5 (1975; H.R. Rep. no. 94-332, pp. 2-3 (1975).

2 Two cases, Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (DC 1972), and Pennsylvania Association for Retarded Children v. Commonwealth of Pennyslvania, 334 F. Supp. 1257 (1971), 343 F. Supp. 279(ED Pa 1972), were later indentified as the most prominent of the cases contributing to Congress' enactment of the Act and the statutes which preceded it. H.R. Rep. No. 94-332, supra , at 3-4. Both decisions are discussed in Part III of this opinion, infra.

3 All functions of the Commissioner of Education, formerly an officer in the Department of Health, Education, and Welfare, were transferred to the Secretary of Education, in 1979 when congress passed the Department of Education Organization Act 20, U.S.C. 3401 et seq. See 20 U.S.C. 3441(a)(1).

4 Despite this preference for "mainstreaming" handicapped children--educating them with nonhandicapped children--Congress organized
that regular classrooms simply would not be a suitable setting for the education of may handicapped children. The Act expressly acknowledge that "the nature or severity of the handicap [may be] such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.' 1412(5). The Act thus provides for the education of some handicapped children in seperate classes or institutional settings. see ibid.; 1413(a)(4).

5 In addition to covering a wide variety of handicapped conditions, the Act requires special educational services for children "regardless of the severity of their handicap." 1412(2)(C), 1414(a)(A).

6 The requirements that parents be permitted to file complaints regarding their child's education , and present when the child's IEP is formulated, represent only two examples of Congress' effort to maximize parental involvement in the education of each handicapped child. In addition, the Act requires that parents be permitted "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and...to obtain an independent educational evaluation of the child." 1415(b)(1)(A). See also 1412(4), 1414(a)(4). State educational policies and the state plan submitted to the

Commissioner of Education must be formulated in "consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children."1412(7). See also 1412(2)(E). Local agencies, which receive funds under the act by applying to the state agency, must submit applications which assure that they have developed procedures for "participation and consultation of the parents or guardians[s] of [handicapped] children" in local educational programs, 1414(a)(1)(C)(iii), and the application itself, along with "all pertinent documents related to such application," must be made "availabe to parents, guardians, and other members of the general public." 1414(a)(4).

7 "Any Party" to a state or local administrative hearing must "be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions." 1415(d).

8 For reasons that are not revealed in the record, the District Court concluded that "[t]he Act itself does not define 'appropriate education." 483 F. Supp. 533. In fact, the Act expressly defines the phrase "free appropriate public education." see 1401(18), to which the District Court was referring. See 483 F. Supp., at 533. After overlooking the statutory definition, the District Court sought guidance not from regulations interpreting the Act, but from regulations promulgated under Section 504 of the Rehabilitation Act. See 483 F. Supp., at 533, citing 45 CFR 84.33(b).

9 The IEP which respondents challenged in the District Court was created for the 1978-1979 school year. Petitioners contend that the District Court erred in reviewing that IEP after the school year had ended and before the school administrators were able to develop another IEP for subsequent years. We disagree. Judicial review invariably takes more than nine months to complete, not to mention the time consumed during the perceding state administrative hearings. The District Court thus correctly ruled that it retained jurisdication to grant relief because the alleged deficiencies in the IEP were capable of repetition as to the parties before it yet evading review. Rowley v. The board of Education of the Hendrick Hudson Central School District, 483 F. Supp. 536. 538 (1980). See Murphy v. Hunt, 455 U.S.--,--(1982); Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

10 Example of 'related services" identified in the Act are "speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling

services, except that such medical services shall be for diagnosis and evaluation purposes only."
1401(17)."

11 The dissent, finding that "the standard of the courts below seems...to reflect the congressional purpose' of the Act, post , at 8, concludes that our answer to this question "is not a satisfactory one." Id., at 5. Presumably, the dissent also agrees with the District Court's conclusion that "It has been left entirely to the courts and hearing officers to give content to the requirement of an 'appropriate education.'" 483 F. Supp., at 533. It thus seems that the dissent would give the courts carte blanche to impose upon the States whatever burden their various judgments indicate should be imposed. Indeed, the dissent clearly characterizes the requirement of an "appropriate education," as open-ended, noting that "if there are limits not evident from the face of the statute on what may be considered an ' appropriate education,' they must be found in the purpose of the statue or its legislative history." Post, at 2. Not only are we unable to find any suggestion from the face of the statute that the requirement of an "appropriate education" was to be limitless, but we also view the dissents approach as contrary to the fundamental proposition that Congress, when exercising its spending power, can impose no burden upon the States unless it does so unambiguously. See infra, at 27, n 26.

No one can doubt that this would have been an easier case if Congress had seen fit to provide a more comprehensive statutory definition of the phrase 'free appropriate public education." But Congress did not do so, and 'our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain-neither to add nor to subtract, neither to delete nor to distort." 62 Cases of Jam v. United States, 340 U.S. 593. 596 (1951). We would be less than faithful to our obligation to construe what congress has written if in this case we were to disregard the staturoty language and legislative history of the Act by concluding that Congress had imposed upon the States a burden of unspecified proportions and weight, to be revealed only through case by case adjudication in this courts.

12 See H.R. Rep. No. 94-332, supra, at 10; Note. The Education of All Handicapped Children Act of 1975, Mich. J.L Ref. 110, 119 (1976).

13 See, e.g.,121 Cong. Rec.19494 (1975)(remarks of Sen. Javits)("all too often, our handicapped citizens have been denied opportunities to receive an adequate education"); 121 Cong Rec. 19502 (1975) (remarks of Sen. Cranston) (millions of handicapped "children are largely excluded from educational opportunities that we give to our other children"); 121 Cog. Rec. 23708 (1975)

(remarks of Rep. Mink) ("handicapped children...are denied access to public schools because of a lack of trained personnel").

14 Similarly, the Senate Report states that it was an "[i]increased awareness of the educational needs of handicapped children and landmark court decisions establishing the right to education for the handicapped children [that] pointed to the necessity of an expanding federal role." S. Rep. No. 94-168, supra, at 5. See also H.R. Rep. No. 94-332, supra, at 2-3.

15 The only substantive standard which can be implied form these cases comports with the standard implicit in the Act. PARC states that each child must receive "access to free public program of education and training appropriate to his learning capacities,"' 334 F. Supp., at 1258, and that further state action is required when it appears that "the needs of the mentally retarded child are not being adequately served, id., at 1266. (emphasis added.) Mills also speaks in terms of "adequate" educational services, 348 F. Supp. at 878, and sets a realistic standard of providing some educational services to each child when every need cannot be met.

"If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the systems then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional or handicapped child than on the normal child." Id., at 876.

16 Like the Act, PARC required the State to identify, locate [and] evaluate" handicapped children, 334 F. Supp., at 1267, to create for each child an individual educational program. id., 1265, and to hold a hearing "on any change in educational assignment," id., at 1266. Mills also required the preparation of an individual educational program for each child. In addition, Mills permitted the child's parents to inspect records relevant to the child's education, to obtain an independent educational evaluation of the child, to object to the IEP and receive a hearing before independent hearing officer, to be represented by counsel at hearing, and to have the right to confront and cross-examine adverse witnesses, all of which are also permitted by the Act. 348 F. Supp., at 879-881. Like the Act, Mills also required that the education of handicapped children be conducted pursuant to an overall plan prepared by the District of Columbia, and established a policy of educating handicapped children with nonhandicapped children whenever possible. Ibid.

BEST COPY AVAILABLE

17 See S. Rep. No. 9-168, supra, at 6-7; H.R. Rep. No. 94-332, supra, at 3-4.

18 the 1974 statute 'incorporated the major principles of the right to education, cases, "by add[ing] important new provisions to Education of the Handicapped Act which require the States to: establish a goal of providing full educational opportunities to all handicapped children; provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation, and educational placement of handicapped children; establish procedures to insure that, to the maximum extent appropriate, handicapped children...are educated with children who are not handicapped,...and establish procedures to insure that testing and evaluation materials and procedures utilized for the for the purposes of classification and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory." S.Rep. No. 94-168, supra, at 8.

The House Report explains that the Act simply incorporated these purposes of the 1974 statute: the Act was intended "primarily to amend...the Education of the Handicapped Act in order to provide permanent authorization and a comprehensive mechanism which will insure that those provisions enacted during the 93rd Congress [the 1974 statute] will result in maximum benefits for handicapped children and their families." H.R. Rep. No. 94-332, supra, at 5.Thus, the 1974 statutes purpose providing handicapped children access to public education became the purpose of the Act.

19 These statistics appear repeatedly throughout the legislative history of the Act, demonstrating a virtual consensus among legislators that 3.9 million handicappped children were receiving an appropriate education in 1975. See, e.g. 121 Cong. Rec. 19486 (1975) (remarks of Sen. Williams); 121 cong. Rec. 19504 (1975) (remarks or Sen. Schweicker); 121 Cong. Rec. 23702 (1975) (remarks of Rep. Madden); 121 Cong. Rec. 23702 (1975) (remarks of Rep. Brademas); 121 Cong. Rec. 23709 (1975) (remarks of Rep. Minish); 21 Cong. Rec. 37024 (1975) (remarks of Rep. Brademas); 121 Cong. Rec. 37027 (1975) (remarks of Sen. Gude); 121 Cong. Rec. 37417 (1975) (remarks of Sen. Javits); 121 Cong. Rec. 37420 (1975) (remarks of Sen. Hathaway).

20 Senator Randolph stated: "only 55 percent of the school-aged handicapped children and 22 percent of the pre-school-aged handicapped children are receiving special educational services." Hearing on S. 6 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess., 1 (1975). Although the figures differ slightly in various parts of the legislative history, the general thrust of

congressional calculations was that roughly one-half of the handicapped children in the United States were not receiving specialized educational services, and thus were not "served." See, e.g., 121 Cong. Rec, 19494 (1975) (remarks of Sen. Javits) ('only 50 percent of the Nation's handicapped children received proper education services"); 121 Cong. Rec. 19504 (1975) (remarks of Sen. Humphrey) ("[a]most 3 million handicapped children, while in school, receive none of the special services that they require in order to make education a meaningful experience"); 121 Cong. Rec. 23706 (1975) (remarks of Rep. Quie) ("only 55 percent [of handicapped children] were receiving a public education"); 121 Cong. Rec. 233709 (1975) (remarks of Rep. Biaggi) ("[o]ver 3 million [handicapped] children in this country are receiving either below par education or none at all").

Statements similar to those appearing in the text, which equate "served" as it appears in the Senate Report to "receiving special education services," appear throughout legislative history. See, e.g., 121 Cong. Rec. 19492 (1975) (remarks of Sen. Williams); 121 Cong. Rec. 19494 (1975) (remarks of Sen. Javits); 121 Cong. Rec. 19496 (1975) (remarks of of Sen. Stone); 121 Cong. Rec. 19504-19505 (1975) (remarks of Sen. Humphrey); 121 Cong. Rec. 23703 (1975) (remarks of Rep. Brademas); Hearings on H.R. 7217 before the Subcommittee on Select Education of the Committee on Education and Labor of the House or Representatives, 94th Cong., 1st Sess. 91, 150, 153 (1975); Hearings on H.R. 4199 before the Select Subcommittee on Education of the Committee on Education and Labor of the House of Representatives, 93rd Cong., 1st Sess., 130, 139 (1973). See also 45 CFR 121a.343(b) (1980).

21 In seeking to read more into the Act thnat its language or legislative history will permit, the United States focuses upon the word "appropriate,' arguing that "that statutory definitions do not adequately explain what [it means]." Brief for United States as Amicus Curiae 13. Whatever Congress meant by an "appropriate" education, it is clear that it did not mean a potential-maximizing education.

The term as used in reference to educating the handicapped appears to have originated in the PARC decision, where the District Court required that handicapped children be provided with "education and training appropriate to [their] learning capacities." 334 F. Supp., at 1258. The word appears again in the Mills decision, the District Court at one point referring to the need for an "appropriate educational program," 348 F. Supp., at 879, and at another point speaking of a "suitable publicly-supported education," id., at 878. Both cases also refer to the need for an "adequate" education. See 334 F. Supp., at 1266; 348 F. Supp. at 878.

The use of 'appropriate" in the language of the Act, although by no means definitive, suggests that Congress used the word as much to prescribe the settings in which handicapped children should be educated as to prescribe the substantive content or supportive services of their education. For example, 1412(5) requires that handicapped children be educated in classrooms with nonhandicapped children "to the maximum extent appropriate." Similarly, 140(19) provides that, "whenever appropriate," handicapped children should attend and participate in the meeting at which their IEP is drafted. In addition, the definition of "free appropriate public education" itself states that instruction given handicapped children should be at an "appropriate preschool, elementary, or secondary school'level. 1401(18)(C). The Act's use of the word "appropriate" thus seems to reflect Congress' recognition that some settings simply are not suitable environments for the participation of some handicapped children. At the very least, these statutory uses of the word refute the contention that Congress used "appropriate" as a term of art which concisely expresses the standard found by the lower courts.

22 See also 121 Cog. Rec. 19492 (1975) (remarks of Sen. Williams); 121 Cong. Rec. 19504 (1975) (remarks of Sen. Humphrey).

23 This view is supported by the congressioanl intention, frequently expressed in the legislative history, that handicapped children be enabled
to achieve a reasonable degree of self sufficiency. After referring to statistics showing that many handicapped children were excluded from public education, the Senate Report states:

"The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the liftetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society." S. Rep. 94-168, supra, at 9. See also H.R. Rep. No. 94-332, supra, at 11. Similarly, one of the principal Senate sponsors

of the Act Stated that "providing appropriate educational services now means that many of these individuals will be able to become a contibuting part of our society, and they will not have to depend on subsistance payments form public funds." 121 Cong. Rec. 19492 (1975) (remarks of Sen. Williams). See also 121 Cong. Rec. 25541 (1975) (remarks of Rep. Harkin); 121 Cong. Rec. 37024 -37025 91975) (remarks of Rep. Brademas); 121 Cong. Rec. 37027 (1975) (remarks of Rep. Gude); 121 Cong. Rep. 37410 (1975) (remarks of Sen. Randolph); 121 Cong. Rec. 37416 (1975) (remarks of Sen Williams).

The desire to provide handicapped children with an attainable degree of personal independence obviously anticipated that state educational programs would confer educational benefits upon such children. But at the same time, the goal of achieving some degree of self sufficiency in most cases is a good deal more modest than the potential-maximizing goal adopted by the lower courts.

Despite its frequent mention, we cannot conclude, as did the dissent in the Court of Appeals, that self sufficiency was itself the substantive standard which congress imposed upon the States. Because many mildly handicapped children will achieve self sufficiency without state assistance while personal independence for the severely handicapped may be an unreachable goal, "self sufficiency" as a substantive standard is at one an inadequate protection and an overly demanding requirement. We thus view these references in the legislative history as evidence Congress' intention that the services provided handicapped children be educationally beneficial, whatever the nature or severity of their handicap.

24 Section 1412(5) of the Act requires that participating States establish "procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes , separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

25 We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system automatically receiving a "free appropoiate public education." In this case, however, we find Amy's academic progress, when considered with the special services and professional consideration accorded by the Furnace Woods school administrators, to be dispositive.

26 In defending the decisions of the District Court and the Court of Appeals, respondents and United States rely upon isolated statements in the legislative history concerning the achievement of maximum potential, see H.R. Rep. No. 94-332, supra, at 13, as support for the contention that Congress intended to impose greater substantive requirements than we have found. These statements, however, are too thin a reed on which to base an interpretation of the Act which disregards both its language and the balance of its legislative history. "Passing references and isolated phrases are not controlling when analyzing a legislative

history." Department of State v. The Washington Post Co.,--U.S.-- (1982)

Moreover, even were we to agree that these statements evince a congrssional intent to maximize each child's potential, we could not hold that Congress has successfully imposed that burden upon the United States.

"[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'... Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." Pennhurst State School v. Halderman, 451 U.S. 1, 17 (1981).

As already demonstrated, the Act and its history impose no requirements on the States like those imposed by the District Court and the Court of Appeal. A fortiori Congress has not done so unambiguously, as required in the valid excercise of its spending power.

27 This enquiry will require a court not only to satisfy itself that the State has adopted the state plan,and assurances required by the Act, but also to determine that the State has created an IEP for the child in question which conforms with the requirements of 1401(19).

28 When the handicapped child is being educated in the regular classrooms of a public system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit. See Part III, supra.

29 In this case, for example, both the state hearing officer and the District Court were presented with evidence as to the best method for educating the deaf, a question long debated among scholars. See Large, Special Problems of the Deaf Under Education for All Handicapped Children Act of 1975, 58 Washington U.L.Q. 213, 229 (1980). The District Court accepted the testimony of respondents' experts that there was "a trend supported by studies showing the greater degree of success of students brought up in deaf households using [method of communication used by the Rowleys]." 483 F. Supp., at 535.

30 It is clear that Congress was aware of the States' traditional role in the formulation and execution of education policy. "Historically, the States have had the primary responsibility for the education of children at the elementary and secondary level." 121 Cong. Rec. 19498 (1975) (remarks of Sen. Dole) See also

471

Epperson v. Arkansas, 393 U.S. 97, 104 (1968 ("[b]y and large, public education in out Nation is committed to the control of state and local authorities").

31 In addition to providing for extensive parental involvement in the formulation of state and local policies, as well as the preparation of individual educational programs, the Act ensures that States will receive the advice of experts in the field of educating handicapped children. As a condition for receiving federal funds under the Act, States must create "an advisory panel, apppointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials , and administrators of programs for handicapped children, which (a) advises the State educational agency of unmet needs within the State in the education of handicapped children, [and] (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children." 1413(a)(12).

32 Because the District Court declined to reach respondents' contention that petitioners had failed to comply with the Act's procedural requirements in developing Amy's IEP, 483 F. Supp.., at 533, n.8, the case must be remanded for further proceedings consistent with this opinion.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

In order to reach its result in this case, the majority opinion contradicts itself, the language of the statute, and the legislative history. Both the majority's standard for a "free appropriate education" and its standard for judicial review disregard congressional intent.

I

The majority first turns its attention to the meaning of a "free approrpiate public education." the Act provides:

"The term 'freee appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standard of the State educational agency, (c) include an appropriate preschool, elementary agency, (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." 20 U.S.C. 1401 (18).

The majority reads this statutory language as establishing a congressional intent limited to briging "previously excluded handicapped children into the public education systems of the States and requiring the States to adopt procedures which would result in individualized consideration of and instruction for each child." Ante, at 12. In its attempt to constrict the definitioin of "appropriate" and the thrust of the Act, the majority opinion states, "Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly the language of the statute contains no requirements like the one imposed by the lower couts-that States commensurate with the opportunity provided to other children.' Ane, at 12, quoting 483, F. Supp. at 534.

I agree that the language of the Act does not contian a substantive standard beyond requiring that the education offered must be "appropriate." However, if there are limits not evident from the face of the statute on what may be considered an "appropriate education," they must be found in the purpose of the statute or its legislative history. The Act itself announces it will provide a "full educational opprotunity to all handicapped children." 20 U.S.C. 1412(2)(A) (emphasis added). This goal is repeated throughout the lesgislative history, in statements too frequent to be "passing references and isloated phrases."[1] Ante, at 27, n. 26, quoting Department of State v. Washington Post Co., ---- U.S. ---- (1982). These statements elucidate the meaning of "appropriate." According to the Senate Report, for example, the Act does "guarantee that handicapped children are provided equal educational oppotunity." S. Rep. No. 94-168, at 9 (1975) (emphasis added). This promise appears throughout the legistrative history. See 121 cong. Rec. 19482-19483 (1975) (remarks of Sen. Randolph); id., at 19504 (Sen. Humphrey); id., at 19505 (Sen. Beall); id., at 23704 (Rep Brademas); id ., at 25538 (Rep. Cornell); id., at 25540 (Rep. Grassley); id., at 37025 (Rep. Perkins); id., at 37030 (Rep. Mink); id., at 37412 (Sen. Taft); id., at 37413 (Sen. Williams); id., at 37418-37419 (Sen. Cranston); id., at 37419-37420 (Sen. Beall). Indeed, at times the purpose of the Act was described as tailoring each handicapped child's educational plan to enable the child "to achieve his or her maximum potential." H.R. Rep. No. 94-332, 94th Cong., 1st sess. 13 19 (1975), See 121 Cong. Rec. 23709 (1975). Sen. Stafford, one of the sponsors of the Act, delcared, "We can all agree that the education [given a handicapped childl should be equivalent, at least, to the one those children who are not handicapped receive." 121 Cong. Rec. 19483 (1975). The legislative history thus directley supports the conclusion that the Act intends to give handicapped children an eductional opporunity commensurate with that given other children.

The majority opinion announces a different substantive standard, that "Congress did not impose upon the States any greater substantive standard than would be necessary to make such access meaningful." Ante, at 13. While "meaningful" is no more enlightening than "appropriate," the Court purports to calrify itself. Because Amy was provided with some specialized instruction from which she obtained some benefit and because she passed from grade to grade, she was receiving a meaningful and therefore appropriate education.[2]

This falls far short of what the Act intented. The Act details as specifically as possible the kind of specialized education each handicapped child must receive. It would apparently satisfy the Court's standard of "access to sepcialized instructon and related services which are individually designed to provide educational benefit to the handicapped child," ante, at 24, for a deaf child such as Amy to be given a teacher with a loud voice, for she would benefit from that service. The Act requires more. It defines "special education" to mean "specifically designed instruction, at no cost to parents or guardians, to meet the unique needs of a handiapped child..." 1401 (16) (emphasis added).3 Providing a teacher with a loud voice would not meet Amy's needs and would not satisfy the Act. The basic floor of opportunity is instead, as the courts below recognized, intended to eliminate the effects of the handicapped, at least to the extent that the child will be gibven an equal opportunity to learn if that is reasonably possible. Amy rowley, without a sign language interpreter, comprehends less than half of what is said in the classroom--less than half of what normal children comprehend. This is hardly an equal opportunity to learn, even if Amy makes passing grades.

Despite its reliance on the use of "apporpriate" in the definition of the Act, the majority opinion speculates that "Congress used the word as much described the settings in which the children should be educated as to prescribe the substantive content or supportive services of their education." Ante, at 20, n. 21. Of course, the word "appropriate" can be applied in may ways; at times in the Act, Congress used it to recommend mainstreaming handicapped children; at other points, it used the word to refer to the content of the individualized education. the issue before us is what standard the word "appropriate" incorporates when it is used to modify "education." The answer given by the Court is not a satisfactory one.

II

The Court's discussion of the standard for judicial review is as flawed as its discussion of a "free appropriate public education.' According to the Court, a court can ask only whether the State has "complied with the procedures set forth in the Act" and whether the individulized education program is "reasonably calculated to enable the child to receive educational benefit." Ante, at 30. Both the language of the Act and legislative history, however, demonstrate that Congress intended the courts to conduct a far more searching inquiry.

The majority assigns major significance to the review provision's being found in a section entitled "procedural Safeguards." But where else would a provision for judicial review belong? The majority does aknowledge that the current language, specifying that a court "shall receive the record of the administrative proceedings, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence, shall grant such relief as the court detemines is appropriate," 1415(e)(2), was substituted at Conference for language that would have restricted the role of the reviewing court much more sharply. It is clear enough to me that Congress decided to reduce substantially judicial deference to state administrative decisions.

The legislative history shows that judicial review is not limited to procedural matters and that the state educational agencies are given first, but not final, responsibility for the content of a handicapped child's education. The Conference committee directs courts to make an "independent decision." S. Conf. Rep. No. 94-455, at 50. the deliberate change in the review provision is an unusually clear indentication that Congress intended courts to undertake substantive review instead of relying on the conclusions of the state agency.

On the floor of the Senate, Senator Williams, the chief sponsor of the bill, committee chairman, and floor manager responsible for the legislation in the Senate, emphasized the breath of the review provisions at both the administrative nad judicial levels:

"Any parent or guardian may present a complaint concerning any matter regarding the identification, evalutaion, or educational placement of the child or the provision of a free appropriate public education to such a child. In this regard, Mr President, I would like to stress that the language referring to 'free appropriate education' has been adopted to make clear that a complaint may involve matters such a questions respecting a child's individualized education program, question of whether special education and related services are being provided without charge to the parents or guardians, questions relating to whether to the services provided a child meet the standards of the State education agency, or any other question within the scope of the definition of 'free appropriate public education.' In addition, it should be clear that a parent or guardian may present a complaint alleging that a State or local education agency has refused to provide services to which a child may be entitled or alleging that the State or local educational agency has erroneously classified a child as as handicapped child when, in fact, that child is not a handicapped child." 121 Cong. Rec. 37415 (emphasis added).

There is no doubt that the state agency itself must make substantivedecisions. the legislative history reveals that the courts are to consider, de novo, the same issues. Senator Williams explicitly stated that the civil action permitted under the Act encompasses all matters related to the original complaint. Id., at 37416.

Thus, the Court's liminations on judicial review have no support in either the language of the Act or the legislative history. Congress did not envision that inquiry would end if a showing is

475

made that the child is receiving passing marks and is advancing from grade to grade. Instead, it intended to permit afull and searching inquiry into any aspect of a handicapped child's education. The court's standard, for example, would not permit a challenge to part of the IEP; the legislative history demonstrate beyond doubt that Congress intended such challenge to be possible, even if the plan as developed is reasonably calculated to give the child some benefits.

Parents can challenge the IEP for failing to supply the special education and related services needed by the individual handicapped child. that is what Rowleys did. As the Government observes, "courts called upon to review the content of an IEP, in accordance with 20 U.S.C. 1415(e) inevitably are required to make a judgment on the basis of the evidence presented, concerning whether the educational methods proposed by the local school district are 'appropriate' for the handicapped child involved." Brief for United States as Amicus Curiae 13. The courts below, as they were required by the Act, did precisly that.

Under the judicial review provisions ofthe Act, neither the District Court nor the Court of Appeals was bound by the state's construction of what an "appropriate" education means in general or by what the state authorities considered to be an appropriate education for Amy Rowley. Because the standard of the courts below seems to me to reflect the congressional purpose and because their factual findings are not clearly erroneous, I respectfully dissent.

1 The Court's opinion relies heavily on the statement, which occurs throughout the legislative history, that, at the time of enactment, one million of the roughly eight million handicapped children in the United States were excluded entirely from the public school system and more than half were receiving an inappropriate education. See, e.g. ante, at pp. 11, 18-19. But this statement was often linked to statements urging equal educational opportunity. See, e.g. 121 Cong. Rec. 19502 (remarks of Sen. Cranston); id. at 23702 (remarks of Rep. Brademas). That is, Congress wanted not only to bring handicapped children into schoolhouse, but wanted also to benefit them once they had entered.

2 As further support of its conclusion, the majority opinion turns to Pennsylvania Association for Retarded Children v. Commonwalth of Pennsylvania (PARC), 334 F. Supp. 1257 (1971), 343 F. Supp. 279 (ED Pa. 1972) and Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (DDC 1972). That these decisions served as an impetus for the Act does not, however, establish them as the limit of the Act. In any case, the very language that the majority quotes from mills, ante at 14-15, 21, sets a standard not of some

education, but of educational opportunity equal to that of non-handicapped children.

Indeed, Mills, relying on decisions since called into question by this Court's opinion in San Antonio School District v. Rodriquez, 411 U.S. 1 (1973), states,

"In Hobson v. Hansen [269 F. Supp. 401 (DD,) Judge Wright found that denying poor public school children educational opportunity equal to that available to more affluent public school children was violative of the Due Process Clause of the Fifth Amendment. A fortiori, the defendants' conduct here, denying plaintiffs and their class not just an equal publicly supported education while providing such education to other children,is violative of the Due Process Clause." 348 F.Supp., at 875.

Whatever the effect of Rodriquez on the validity of this reasoning, the statement sxposes the majority's mischaracterization of the opinion and thus of the assumptions of the legislature that passed the act.

*"Related services' are "transportation, and such developmental, corrective, and other supportive services...as may be required to assist a handicapped child to benefit from special education." 1401(17).

21 IDELR 664
35 F.3d 1396

Clyde K. ex rel. Ryan K. v. Puyallup Sch. Dist.
CLYDE K. and SHEILA K., individually and as guardians for RYAN K., minor, Plaintiffs-Appellants
v.
PUYALLUP SCHOOL DISTRICTS,
Defendant-Appellee CLYDE K.; SHEILA K.,
Plaintiffs-Appellants v.

PUYALLUP SCHOOL, Defendant-Appellee

No. 93-35572; 93-35954

U.S. Court of Appeals, Ninth Circuit

SEPTEMBER 13 1994

* Placement, Placement Procedures Generally

* Procedural Safeguards, In General

* ATTENTION DEFICIT DISORDERS (ADD/ADHD)

* Least Restrictive Environment (LRE), In General * Other Health

Impairment, Other Conditions

* Placement, Separate Facilities

* Procedural Safeguards, Notice

* Placement, Change in Program/Services

* Placement, Notice Requirements

* Placement, IEP Considerations

* Individualized Education Program (IEP), In General
* Individualized Education Program (IEP), Participants in/Procedures for IEP Meeting

Summary

A 15-year-old student with Tourette Syndrome and Attention Deficit Hyperactivity Disorder (ADHD) received special education services while enrolled in a mainstream environment until he assaulted a staff member and was removed from school under an emergency expulsion order. The district proposed to temporarily

place the student in an off-campus, self-contained program and although the parents initially agreed, they later resorted to due process to seek his continued placement in a mainstream setting with the assistance of a personal aide. An administrative law judge (ALJ) found that the district's actions complied with the IDEA, and a district court affirmed this decision. The parents appealed.

HELD: for the district.

The circuit court found no merit in the parents' argument that the district's actions were procedurally invalid. The district's hiring of an aide to observe the student's behavior without written notice to the parents was not a change in the student's educational program which required notice, since the aide did not provide educational services or any other type of assistance to the student. Nor did the district err by failing to draft a new IEP for the student before attempting to move him to the self-contained placement, since the student's then current IEP could be implemented in the proposed placement. When the district later agreed to draft a new IEP for the student, its failure to bring teachers from the district's school to the IEP meeting did not violate the IDEA. The attendance of the student's teachers from the self-contained placement satisfied the relevant Part B regulation, which required either a teacher from the student's current placement or future placement.

The circuit court then turned to the parents' substantive claims. First, it agreed with the district court that the self-contained placement was the proper "stay-put" placement pending judicial proceedings, since it was the student's placement at the time the parents requested a due process hearing and the parents had initially consented to this placement. Next, applying the four-part test it adopted in Sacramento City Unified Sch. Dist v. Rachel H., the circuit court held that the self-contained placement was the least restrictive environment for the student. These factors included the academic benefits of placement in a mainstreamed setting with appropriate supplementary aids and services; the non-academic benefits of mainstream placement; the negative effects the student's presence might have on the other students and teachers; and the cost of educating the student in the mainstream environment. It was undisputed that the student no longer received an academic benefit from his mainstream placement, as evidenced by his declining level of academic achievement and his disruptive classroom behavior which interfered with his learning. The court further found that a personal aide was not likely to make a meaningful difference and noted that the district had offered supplementary services and accommodations through special training for staff, resource classes in academic subjects, and the assistance of a behavioral specialist. The student's non-academic benefits were minimal, as no evidence suggested that he modeled his behavior on that of his non-disabled peers and he remained socially isolated with few friends. Evidence of the student's negative effect on teachers and other students included violent attacks on two students, assault of a staff member, and disruption of the class by profanity and sexually-explicit remarks to female students. Thus, the court concluded that this evidence overwhelmingly supported the district court's finding that the student's behavioral problems interfered with the ability of other students to learn. Finally, the cost factor of hiring an aide was irrelevant in light of the determination that this service would not benefit the student. Accordingly, the circuit court affirmed the decision of the district court.

Counsel for Parents: Charles D. Williams, Silverdale, Washington; Neil R. Martinson, Federal Way, Washington.

Counsel for District: Joni R. Kerr, Vandenberg & Johnson, Tacoma, Washington.

Before Wright, Kozinski and Fernandez, Circuit Judges.

KOZINSKI, Circuit Judge.

On Appeal from the United States District Court for the Western District of Washington.

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400 et seq., parents and school officials must try to reach agreement on the appropriate educational program for a disabled student. We consider what happens when they fail.

I

Ryan K. is a fifteen-year-old student with Tourette's Syndrome and Attention Deficit Hyperactivity Disorder (ADHD). Prior to the events giving rise to this litigation, Ryan received special education services while enrolled in mainstream schools in the Puyallup School District. Between mid-January and mid-March 1992, Ryan's behavioral problems at Ballou Junior High School escalated dramatically. He frequently disrupted class by taunting other students with name-calling and profanity, insulting teachers with vulgar comments, directing sexually-explicit remarks at female students, refusing to follow directions and kicking and hitting classroom furniture. In addition, Ryan was involved in several violent confrontations. On January 27, he received a one-day suspension for punching another student in the face. On February 10, he received a second suspension for pushing another student's head into a door. Finally, on March 12, Ryan was removed from school pursuant to an emergency expulsion order after he assaulted a school staff member.1

Ryan's parents, Clyde and Sheila K., agreed with school officials that it was no longer safe for Ryan to remain at Ballou. Ryan's teachers and school administrators met shortly after his expulsion to discuss available alternatives. They suggested placing Ryan temporarily in an off-campus, self-contained program called Students Temporarily Away from Regular School (STARS), where Ryan would be in a more structured environment and receive more individualized attention. On March 17, 1992, the school notified Ryan's parents of its recommendation that Ryan be placed in STARS on an interim basis until he could be safely reintegrated into regular school programs.

Though Ryan's parents initially agreed with the school's proposed change of placement, they subsequently had second thoughts. On March 27, 1992, they requested a due process hearing under Wash. Admin. Code Section 392-171-531; on April 6, they formally rejected placement at STARS until a new Individualized Education Program (IEP) had been drafted. After efforts to draft a new IEP broke down, Ryan's parents insisted that he return to Ballou for the remainder of the school year. Over the summer, a ten-day due process hearing was held pursuant to 20 U.S.C. Section 1415(b)(2). The administrative law judge issued her ruling on September 14, 1992, concluding that the school fully complied with the IDEA. The parents appealed to the district court, which, after hearing additional testimony and reviewing the record of the administrative proceedings, affirmed the ALJ's decision in all material respects on March 23, 1993.[2]

II

As a preliminary matter, the parties disagree over who should have borne the burden of proof in the district court. The school clearly had the burden of proving at the administrative hearing that it complied with the IDEA. Ryan's parents contend the burden of proof remained on the school in the district court as well, even though they were the ones appealing the administrative ruling. Generally, the party challenging an agency's decision bears the burden of proof. Whether the IDEA calls for an exception to this general principle has yet to be decided in this circuit. The parents rely on Oberti v. Board of Educ., 995 F.2d 1204 (3d Cir. 1993), which held that the burden of proof remains on the school even if the school prevails at the administrative hearing. The court in Oberti stated that placing the burden of proof on the school is essential to ensure that parents' rights under the IDEA aren't undermined. Id. at 1219. We note, however, that merely because a statute confers substantive rights on a favored group does not mean the group is also entitled to receive every procedural advantage. Absent clear statutory language to the contrary, procedural questions are resolved by neutral principles that are independent of any particular statute's substantive policy objectives. Allocation of the burden of proof has long been governed by the rule that the party bringing the lawsuit must persuade the court to grant the requested relief. Because we find nothing in the IDEA suggesting that a contrary standard should apply here, we join the substantial majority of the circuits that have addressed this issue by placing the burden of proof on the party challenging the administrative ruling. See

Roland M. v. Concord Sch. Comm., 910 F.2d 983 991 (1st Cir. 1990); Kerkam v. McKenzie, 862 F.2d 834, 887 (D.C.Cir. 1988); Spielberg v. Henrico County Publ. Sch., 853 F.2d 256, 258 n.2 (4th Cir. 1988).

III

Ryans parents allege various procedural violations of the IDEA. We address each of these in turn.

A. On March 11, 1992, after Ryan had been suspended twice for assaulting other students, the school hired an aide to observe Ryan's behavior over a three-day period. The aide was hired at the urging of Ryan's doctors, who suggested that a first-hand report on his behavioral problems would be helpful in evaluating appropriate responses. Ryan's parents claim the school violated 34 C.F.R. Section 300.504(a) because it failed to give them written notice before hiring the aide.

The parents contend that hiring the aide constituted a change of Ryan's educational program, thus triggering the prior notice requirement of section 300.540(a). We agree with the district court that hiring the aide did not change Ryan's educational program. The aide merely observed Ryan's behavior; he didn't provide educational services or any other type of assistance. As a result, prior written notice was not required. See Doe v. Maher, 793 F.2d 1470, 1487 (9th Cir. 1986), aff'd sub nom. Honig v. Doe, 484 U.S. 305 (1988).

B. In the wake of Ryan's emergency expulsion on March 12, school officials met to consider their options.3 Ryan's multi-disciplinary team concluded that his increasingly aggressive behavior posed a clear danger to others at the school and was significantly disrupting the educational process for other students. The team reviewed Ryan's current IEP---which had taken effect in October 1991 and remained valid through the end of the school year---and concluded that its objectives could be met satisfactorily at STARS. On March 17, the school sent Ryan's parents a Notice of Proposed Placement Change, suggesting that Ryan attend STARS on a temporary basis while the parents and school officials developed a plan to reintegrate him into a mainstream setting. Ryan's parents allege that the school violated IDEA procedural requirements by failing to draft a new IEP before attempting to move Ryan to STARS.

We reject the contention. The district court found that Ryan's parents initially agreed with the school's recommended placement, including the determination that Ryan's current IEP could be implemented at STARS. Though Ryan's parents vigorously contend they never consented to this change of placement, we cannot conclude, after reviewing the record, that the district court's contrary finding is clearly erroneous. Since the primary goals and objectives of Ryan's current IEP could be achieved in the proposed placement, the school was not obligated to draft a new IEP prior to making its recommendation. See Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1042 (5th Cir. 1989).4

C. After preparations had been made for Ryan's arrival at STARS, Ryan's parent informed the school they wouldn't let him attend until the new IEP was drafted. Though school officials continued to believe Ryan's current IEP could be implemented satisfactorily at STARS, they agreed to work with the parents in drafting a new one. Ryan's parents contend the school violated the IDEA when it failed to bring teachers from Ballou to the IEP meetings.

The record reveals that the school complied with its obligations under the IDEA. Under 34 C.F.R. § 300.314(a)(2) Ryan's teacher had to attend the meetings. The school saw this by having a teacher and a behavioral specialist from STARS attend the IEP meeting on May 1. Ryan's parents claim this didn't suffice because Ryan's teachers were those from Ballou, not those from STARS. By May 1, however, Ryan hadn't attended Ballou for 45 days; in accordance with the earlier agreement reached between the school and Ryan's parent, he had been removed from Ballou and enrolled in the STARS program. Thus, as the district court found, the school complied with section 300.344 by having teachers from STARS attend the IEP meeting. See C.F.R. § 300.344, note 1(b) (noting that teacher required to be present at meeting can be either teacher from student's current placement, or teacher from student's future placement.5

IV

We turn next to the alleged substantive violations of the IDEA.

A. Ryan's parents claim the district court erred when it held that STARS had the "stay-put" placement under 20 U.S.C. § 1415(e)(3), which provides that during the pendency of any proceedings under the IDEA, "the child shall remain in the then current educational placement." As noted above, when Ryan's parents requested a due process hearing on March 27, 1992, Ryan's current educational placement was STARS; with the parents consent, the school had already removed him from Ballou. That Ryan's parents later withdrew their consent on April 6 and pursued administrative remedies doesn't change this reality. We agree with district court that STARS was the stay-put placement under section 1415(3)(3).

B. Ryan's parents also contend the district court erred in concluding that STARS was the least restrictive environment in which Ryan could be educated satisfactorily. See 20 U.S.C. § 1412(5)(B). They claim Ryan can be educated in a mainstream setting if the school provides a personal classroom aide to assist him.

We've recently adopted a four-part test to determine whether a disabled student's placement represents the least restrictive environment. See Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1984). In applying this test, we consider: (1) the academic benefits of placement in a mainstream setting, with any supplementary aides and services that might be appropriate; (2) the non-academic benefits of mainstream placement, such as language and behavior models provided by non-disabled students; (3) the negative effects the student's presence may have on the teacher and other students; and (4) the cost of educating the student in a mainstream environment. Id. at 1401, 1404. We review for clear error the district court's factual findings as to each of these elements; we review de novo its conclusion as to the appropriateness of a student's educational placement under the IDEA. Id. at 1402.

Applying these elements to the case before us, we conclude that STARS was the least restrictive environment.[6] First, it is undisputed that by March 1992, Ryan no longer received any academic benefit from his mainstream placement at Ballou. Ryan's disruptive classroom behavior largely prevents him from learning; indeed, test results indicate that his level of academic achievement actually declined during the 1991-91 school-year. Nor is it likely---given the severity of Ryan's behavioral problems---that a personal aide would have made a meaningful difference.[7] Second, Ryan derived at best only minimal non-academic benefits from his placement at Ballou. No evidence in the record suggests that Ryan modelled his behavior on that of his non-disabled peers. Moreover, Ryan's doctors found that he was socially isolated at Ballou, had few friends, and suffered a great deal of stress from the teasing he was subjected to by other students.

With respect to the third element, the record indicates that Ryan's presence in classes at Ballou had an overwhelmingly negative effect on teachers and other students. By March 1992, Ryan's behavior had become dangerously aggressive: He violently attached two students before being expelled for assaulting a school staff member. These are not incidents school officials can dismiss lightly; they have a special obligation to ensure that students entrusted to their care are kept out of harm's way. In addition to posing a danger to others at Ballou, Ryan's behavioral problems regularly disrupted class. the record discloses that he frequently taunted other students with name-calling and profanity, and that on several occasions he made vulgar and insulting comments to teachers. Ryan also directed sexually-explicit remarks at female students, another legitimate cause for concern among school officials. Given the extremely harmful effects sexual harassment can have on young female students, public officials have an especially compelling duty not to tolerate it in the classrooms and hallways of our schools. See Monica I. Sherer, Comment, No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment,141 U.Pa.L.Rev. 2119, 2133-35 (1993) (noting that targets of peer sexual harassment often experience embarrassment, fear, anxiety and loss of self-confidence, which in turn can lead to diminished opportunities for social and educational growth). Moreover, school officials might reasonably be concerned about liability for failing to remedy peer sexual harassment that exposes female students to a hostile educational environment.[8]

The record supports the district court's finding that Ryan's behavioral problems interfered with the ability of other students to learn. Disruptive behavior that significantly impairs the education of other students strongly suggests a mainstream placement is no longer appropriate. See 34 C.F.R. § 300.552, Comment. While school officials have a statutory duty to ensure that disabled students receive an appropriate education, they are not required to sit on their hands when a disabled student's behavioral problems prevent both him and those around him from learning.

Weighing these elements together, we conclude that STARS was Ryan's least restrictive environment. See Daniel R.R., 874 F.2d at 1050-51.[9]

Conclusion

Though the doors to federal courts are always open, the slow and tedious workings of the judicial system make the courthouse a less than ideal forum in which to resolve disputes over a child's education. Ryan's experience offers a poignant reminder that everyone's interests are better served when parents and school officials resolve their differences through cooperation and compromise rather than litigation.[10]

The judgment of the district court is AFFIRMED.

[1] Though the school contended below that Ryan's disruptive behavior wasn't related to his disability, Ryan's doctors disagreed. The district court found that Ryan's behavioral problems did stem from Tourette's Syndrome and ADHD. That finding is not clearly erroneous and, indeed, the school district doesn't challenge it.

[2] Judge Bryan was already familiar with both the IDEA and Puyallup's programs. See Parents of Student W. v. Puyallup Sch. Dist., No. 93-35071, slip op. 9259 (9th Cir. Aug. 17, 1994) (affirming summary judgment for school district on validity of ten-day suspension guidelines).

[3] Schools can temporarily remove a disabled student from a mainstream placement only if the child poses an immediate threat to the safety of himself or others. Absent a court order or parental consent, the student can't be suspended for more than ten

school days if his misconduct stems from a protected disability. See Honig, 484 U.S. at 325.

4 Ryan's parents also allege a violation of 34 C.F.R. § 300.534(b), claiming the school should have reassessed Ryan's special education need before recommending a change of placement. Because they failed to raise the issue at either the administration hearing or in the district court, we decline to consider it here.

5 Though Ryan's parents were frustrated by the absence of Ballou teachers at the May 1 meeting, this did not justify the singularly counterproductive stance taken by their attorney, Neil Martinson. Instead of at least initiating discussions with the school, he abruptly ended the meeting, declaring that further negotiations would be pointless. He then announced that Ryan would be returning to Ballou on the next school day, May 4. When school officials pleaded with parents to stay and help prepare for Ryan's return to Ballou, Martinson insisted they leave the meeting with him at once.

Judge Bryan, who remained composed and patient throughout the proceedings in the district court, cogently asked "[w]hat happened there? All we know is that [Ryan's parent] did not participate very actively. Their participation was through Mr. Martinson. Mr. Martinson's approach was rigid, it was one way only, 'my way or the highway,' so to speak. It was not realistic."

If Martinson was concerned that the parents might be waiving their statutory rights by staying, he surely knew how to make a record indicating that the parents were staying under protest. But it is difficult to imagine what interests of Ryan's were served by thrusting him back into school environment where he was having significant difficulty and then refusing even to discuss how these problems might be ameliorated. Such hardball tactics are seldom productive even in ordinary civil litigation, and are particularly ill-advised in this context. Working out an acceptable educational program must, in the end, be a cooperative effort between parents and school officials; the litigation process is simply too slow and too costly to deal adequately with the rapidly changing needs of children. See, e.g., nn. 6 & 10 infra. In addition, litigation tends to poison relationships, destroying channels for constructive dialogue that may have existed before the litigation began. This is particularly harmful here, since parents and school officials must---despite any bad feelings that develop between them---continue to work closely with one another. As this case demonstrates, when combat lines are firmly drawn, the child's interests often are damaged in the ensuing struggle.

6 We note the limited scope of our decision: STARS was intended to be a temporary placement; the parties agreed Ryan should be reintegrated into mainstream programs as soon as that became

feasible. We cannot determine on the record before us whether Ryan's behavioral problems abated during the 1992-93 and 1993-94 school years. Consequently, we reach no conclusion as to whether STARS or a similar self-contained program will be Ryan's least restrictive environment during 1994-95. Cf. Rachel H., 14 F.3d at 1405; Greer v. Rome City Sch. Dist., 950 F.2d 688, 699 (11th Cir. 1991).

7 This is not a case where school officials failed to provided supplementary services or make reasonable adjustments to accommodate a student's disability. Prior to Ryan's enrollment at Ballou, teachers and staff attended special training sessions designed to educate them about Tourette's Syndrome. ER 120. Ryan received maximum support from the school's special education staff, attending small group "resource classes" for each of his academic subjects. ER 119-20. In addition, Ryan received the assistance of the school's behavioral specialist, who secured standing permission for Ryan to leave class whenever he needed time to relieve his "tics" in private. The school designated a special area in the nurse's office for this purpose. ER 123.

8 See, e.g., Doe v. Petaluma City Sch. Dist., 830 F.Supp. 1560, 1571 (N.D.Cal. 1993) (holding that, where intentional discrimination is shown, schools can be liable for monetary damages under Title IX, 20 U.S.C. § 1681 et seq., for failing to eradicate hostile environment caused by peer sexual harassment; Kristina Sauerwein, A New Lesson in Schools: Sexual Harassment Is Unacceptable, L.A. Times, Aug. 1, 1994. at E1 (nothing that plaintiff in Doe will seek $1 million in damages at trial set for early next year); see also Tamar Lewin, Students Seeking Damages for Sex Bias, N.Y. Times, July 15, 1994, at B7 (suit for peer sexual harassment filed against school district in Albany, N.Y., by 12-year-old female student.).

9 Though the parties didn't specify the cost of hiring a classroom aide for Ryan, this fourth factor is irrelevant in light of the district court's finding that an aide would not have materially improved Ryan's ability to benefit from his placement at Ballou.

10 Ryan has now spent two years in a self-contained program originally intended to serve as a short-term interim placement. The parties' unfortunate inability to reach agreement has resulted in legal expenses of over $100,000 for the school district alone---money that might have been better spent improving educational opportunities for Ryan and other disabled students. This is surely a case where the lawyers would have better served their clients---and the interests of the society---had they concentrated their efforts on being healers and mediators rather than warriors. See, e.g., Warren E. Burger, The Role of the Lawyer Today, 59 Notre Dame L. Rev. 1, 2 (1983) ("In their highest role, lawyers should be the healers of conflicts and, as such, should help the diverse

parts of a complex, pluralistic social order function with a minimum of friction.")

114 S.Ct. 361
Florence County School District Four

Florence County School District Four et al. v. Carter, a minor, by and through her father and next friend, Carter

Supreme Court of the United States

91-1523

November 9, 1993

the United States Court of Appeals for the fourth circuit{cf11}app

Justice O'Connor delivered the opinion of the Court.
The Individuals with Disabilities Education Act (IDEA), 84 Stat. 175, as amended, 20 U. S. C. §1400 et seq. (1988 ed. and Supp. IV), requires States to provide disabled children with a "free appropriate public education," §1401(a)(18). This case presents the question whether a court may order reimbursement for parents who unilaterally withdraw their child from a public school that provides an inappropriate education under IDEA and put the child in a private school that provides an education that is otherwise proper under IDEA, but does not meet all the requirements of §1401(a)(18). We hold that the court may order such reimbursement, and therefore affirm the judgment of the Court of Appeals.

I

Respondent Shannon Carter was classified as learning disabled in 1985, while a ninth grade student in a school operated by petitioner Florence County School District Four. School officials met with Shannon's parents to formulate an individualized education program (IEP) for Shannon, as required under IDEA. 20 U.S.C. §§ 1401(a)(18) and (20), 1414(a)(5) (1988 ed. and Supp. IV). The IEP provided that Shannon would stay in regular classes except for three periods of individualized instruction per week, and established specific goals in reading and mathematics of four months' progress for the entire school year. Shannon's parents were dissatisfied, and requested a hearing to challenge the appropriateness of the IEP. See §1415(b)(2). Both the local educational officer and the state educational agency hearing officer rejected Shannon's parents' claim and concluded that the IEP was adequate. In the meantime, Shannon's parents had placed her in Trident Academy, a private school specializing in educating children with disabilities. Shannon began at Trident in September 1985 and graduated in the spring of 1988.

Shannon's parents filed this suit in July 1986, claiming that the school district had breached its duty under IDEA to provide Shannon with a "free appropriate public education," §1401(a)(18), and seeking reimbursement for tuition and other costs incurred at Trident. After a bench trial, the District Court ruled in the parents' favor. The court held that the school district's proposed educational program and the achievement goals of the IEP "were wholly inadequate" and failed to satisfy the requirements of the Act. App. to Pet. for Cert 27a. The court further held that "[a]lthough [Trident Academy] did not comply with all of the procedures outlined in [IDEA]," the school "provided Shannon an excellent education in substantial compliance with all the substantive requirements" of the statute. Id., at 37a. The court found that Trident "evaluated Shannon quarterly, not yearly as mandated in [IDEA], it provided Shannon with low teacher-student ratios, and it developed a plan which allowed Shannon to receive passing marks and progress from grade to grade." Ibid. The court also credited the findings of its own expert, who determined that Shannon had made "significant progress" at Trident and that her reading comprehension had risen three grade levels in her three years at the school. Id., at 29a. The District Court concluded that Shannon's education was "appropriate" under IDEA, and that Shannon's parents were entitled to reimbursement of tuition and other costs. Id., at 37a.

The Court of Appeals for the Fourth Circuit affirmed. 950 F.2d 156 (1991). The court agreed that the IEP proposed by the school district was inappropriate under IDEA. It also rejected the school district's argument that reimbursement is never proper when the parents choose a private school that is not approved by the State or that does not comply with all the terms of IDEA.

According to the Court of Appeals, neither the text of the Act nor its legislative history imposes a "requirement that the private school be approved by the state in parent-placement reimbursement cases." Id., at 162. To the contrary, the Court of Appeals concluded, IDEA's state-approval requirement applies only when a child is placed in a private school by public school officials. Accordingly, "when a public school system has defaulted on its obligations under the Act, a private school placement is `proper under the Act' if the education provided by the private school is `reasonably calculated to enable the child to receive educational benefits.'" Id., at 163, quoting Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 207 (1982).

The court below recognized that its holding conflicted with Tucker v. Bay Shore Union Free School Dist., 873 F.2d 563, 568 (1989), in which the Court of Appeals for the Second Circuit held that parental placement in a private school cannot be proper under the Act unless the private school in question meets the standards of the state education agency. We granted certiorari, 507 U. S. ___ (1993), to resolve this conflict among the Courts of Appeals.

II

In School Comm. of Burlington v. Department of Ed. of Mass., 471 U.S. 359, 369 (1985), we held that IDEA's grant of equitable authority empowers a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." Congress intended that IDEA's promise of a "free appropriate public education" for disabled children would normally be met by an IEP's provision for education in the regular public schools or in private schools chosen jointly by school officials and parents. In cases where cooperation fails, however, "parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." Id., at 370. For parents willing and able to make the latter choice, "it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials." Ibid.

Because such a result would be contrary to IDEA's guarantee of a "free appropriate public education," we held that "Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case." Ibid.

As this case comes to us, two issues are settled: 1) the school district's proposed IEP was inappropriate under IDEA, and 2) although Trident did not meet the §1401(a)(18) requirements, it provided an education otherwise proper under IDEA. This case presents the narrow question whether Shannon's parents are barred from reimbursement because the private school in which Shannon enrolled did not meet the §1401(a)(18) definition of a "free appropriate public education."*1 We hold that they are not, because §1401(a)(18)'s requirements cannot be read as applying to parental placements.

Section 1401(a)(18)(A) requires that the education be "provided at public expense, under public supervision and direction." Similarly,
§1401(a)(18)(D) requires schools to provide an IEP, which must be designed by "a representative of the local educational agency," 20 U.S.C. §1401(a)(20) (1988 ed., Supp. IV), and must be "establish[ed]," "revise[d]," and "review[ed]" by the agency, §1414(a)(5). These requirements do not make sense in the context of a parental placement. In this case, as in all Burlington reimbursement cases, the parents' rejection of the school

district's proposed IEP is the very reason for the parents' decision to put their child in a private school. In such cases, where the private placement has necessarily been made over the school district's objection, the private school education will not be under "public supervision and direction."

Accordingly, to read the §1401(a)(18) requirements as applying to parental placements would effectively eliminate the right of unilateral withdrawal recognized in Burlington. Moreover, IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free. Burlington, supra, at 373. To read the provisions of §1401(a)(18) to bar reimbursement in the circumstances of this case would defeat this statutory purpose.

Nor do we believe that reimbursement is necessarily barred by a private school's failure to meet state education standards. Trident's deficiencies, according to the school district, were that it employed at least two faculty members who were not state-certified and that it did not develop IEPs. As we have noted, however, the §1401(a)(18) requirements -- including the requirement that the school meet the standards of the state educational agency, §1401(a)(18)(B) -- do not apply to private parental placements. Indeed, the school district's emphasis on state standards is somewhat ironic. As the Court of Appeals noted, "it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." 950 F.2d, at 164.

Accordingly, we disagree with the Second Circuit's theory that "a parent may not obtain reimbursement for a unilateral placement if that placement was in a school that was not on [the State's] approved list of private" schools. Tucker, 873 F.2d, at 568 (internal quotation marks omitted). Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement.

Furthermore, although the absence of an approved list of private schools is not essential to our holding, we note that parents in the position of Shannon's have no way of knowing at the time they select a private school whether the school meets state standards. South Carolina keeps no publicly available list of approved private schools, but instead approves private school placements on a case-by-case basis. In fact, although public school officials had previously placed three children with disabilities at Trident, see App. to Pet. for Cert. 28a, Trident had not received blanket approval from the State. South Carolina's case-by-case approval system meant that Shannon's parents needed the cooperation of state officials before they could know whether Trident was state-

492

approved. As we recognized in Burlington, such cooperation is unlikely in cases where the school officials disagree with the need for the private placement. 471 U.S., at 372.

III

The school district also claims that allowing reimbursement for parents such as Shannon's puts an unreasonable burden on financially strapped local educational authorities. The school district argues that requiring parents to choose a state-approved private school if they want reimbursement is the only meaningful way to allow States to control costs; otherwise States will have to reimburse dissatisfied parents for any private school that provides an education that is proper under the Act, no matter how expensive it may be.

There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

Moreover, parents who, like Shannon's, "unilaterally change their child's placement during the pendency of review proceedings, without the consent of the state or local school officials, do so at their own financial risk." Burlington, supra, at 373-374. They are entitled to reimbursement only if a federal court concludes both that the public placement violated IDEA, and that the private school placement was proper under the Act.

Finally, we note that once a court holds that the public placement violated IDEA, it is authorized to "grant such relief as the court determines is appropriate." 20 U.S.C. §1415(e)(2). Under this provision, "equitable considerations are relevant in fashioning relief," Burlington, 471 U.S., at 374, and the court enjoys "broad discretion" in so doing, id., at 369. Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable.

Accordingly, we affirm the judgment of the Court of Appeals.

So ordered.

*1 Section 1401(a)(18) defines "free appropriate public education" as, "special education and related services that

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program...."

Posting_Date: 19960605

559:231 Honig v. Doe

HONIG, California Superintendent of Public Instruction v. DOE, et al., No. 86-728

U.S. Supreme Court

JANUARY 20 1988

* Discipline, Disciplinary Policies Generally

* Placement, Current Placement/Maintenance of Placement

* Exhaustion of Administrative Remedies, In General

* Serious Emotional Disturbance, Placement

Summary

In order to assure that States receiving federal financial assistance will provide a "free appropriate public education" for all disabled children, including those with serious emotional disturbances, the Education of the Handicapped Act (EHA or Act) establishes a comprehensive system of procedural safeguards designed to provide meaningful parental participation in all aspects of a child's educational placement, including an opportunity for an impartial due process hearing with respect to any complaints such parents have concerning their child's placement, and the right to seek administrative review of any decisions they think inappropriate. If that review proves unsatisfactory, either the parents or the local educational agency may file a civil action in any state or federal court for "appropriate" relief. 20 U.S.C. 1415(e)(2). The Act's "stay-put" provision directs that a disabled child "shall remain in [his or her] then-current educational placement" pending completion of any review proceedings, unless the parents and state or local educational agencies otherwise agree. Section 1415(e)(3). Respondents Doe and Smith, who were emotionally disturbed students, were suspended indefinitely for violent and disruptive conduct related to their disabilities, pending the completion of expulsion proceedings by the San Francisco Unified School District (SFUSD). After unsuccessfully protesting the action against him, Doe filed a suit in Federal District Court, in which Smith intervened, alleging that the suspension and proposed expulsion violated the EHA, and seeking injunctive relief against SFUSD officials and petitioner, the State Superintendent of Public Instruction. The court entered summary judgment for respondents on

their EHA claims and issued a permanent injunction. The Court of Appeals affirmed with slight Eldifications.

HELD:

1. The case is moot as to respondent Doe, who is now 24 years old, since the Act limits eligibility to disabled children between the ages of 3 and 21. However, the case is justiciable with respect to respondent Smith, who continues to be eligible for EHA educational services since he is currently only 20 and has not yet completed high school. This Court has jurisdiction since there is a reasonable likelihood that Smith will again suffer the deprivation of EHA-mandated rights that gave rise to this suit. Given the evidence that he is unable to conform his conduct to socially acceptable norms, and the absence of any suggestion that he has overcome his behavioral problems, it is reasonable to expect that he will again engage in aggressive and disruptive classroom misconduct. Moreover, it is unreasonable to suppose that any future educational placement will so perfectly suit his emotional and academic needs that further disruptions on his part are improbable. If Smith does repeat the objectionable conduct, it is likely that he will again be subjected to the same type of unilateral school action in any California school district in which he is enrolled, in light of the lack of a statewide policy governing local school responses to disability-related misconduct, and petitioner's insistence that all local school districts retain residual authority to exclude disabled children for dangerous conduct. In light of the ponderousness of review procedures under the Act, and the fact that an aggrieved student will often be finished with school or otherwise ineligible for EHA protections by the time review can be had in this Court, the conduct Smith complained of is "capable of repetition, yet evading review." Thus his EHA claims are not moot. Pp. 10-16:

2. The "stay-put" provision prohibits state or local school authorities from unilaterally excluding disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities during the pendency of review proceedings. Section 1415(e)(3) is unequivocal in its mandate that "the child SHALL remain in the then-current educational placement" (emphasis added), and demonstrates a congressional intent to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. This Court will not rewrite the statute to infer a "dangerousness" exception on the basis of obviousness or congressional inadvertence, since, in drafting the statute, Congress devoted close attention to Mills v. Board of Education of District of Columbia, 348 F.Supp. 866, and Pennsylvania Assn. for

Retarded Children v. Pennsylvania, 334 F.Supp. 1257, and 343 F.Supp. 279, thereby establishing that the omission of an emergency exception for dangerous students was intentional. However, Congress did not leave school administrators powerless to deal with such students, since implementing regulations allow the use of normal, nonplacement-changing procedures, including temporary suspensions for up to 10 schooldays for students posing an immediate threat to others' safety, while the Act allows for interim placements where parents and school officials are able to agree, and authorizes officials to file a 1415(e)(2) suit for "appropriate" injunctive relief where such an agreement cannot be reached. In such a suit, 1415(e)(3) effectively creates a presumption in favor of the child's current educational placement which school officials can rebut only by showing that maintaining the current placement is substantially likely to result in injury to the student or to others. Here, the District Court properly balanced respondents' interests under the Act against the state and local school officials' safety interest, and both lower courts properly construed and applied 1415(e)(3), except insofar as the Court of Appeals held that a suspension exceeding 10 schooldays does not constitute a prohibited change in placement. The Court of Appeals' judgment is modified to that extent. Pp. 16-21.

3. Insofar as the Court of Appeals' judgment affirmed the District Court's order directing the State to provide services directly to a disabled child where the local agency has failed to do so, that judgment is affirmed by an equally divided Court. Pp. 21-22.

Rehnquist, C.J., and Brennan, White, Marshall, Blackmun, Stevens, Scalia and O'Connor, JJ.

JUSTICE BRENNAN delivered the opinion of the Court.

As a condition of federal financial assistance, the Education of the Handicapped Act requires States to ensure a "free appropriate public education" for all disabled children within their jurisdictions. In aid of this goal, the Act establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree. Among these safeguards is the so-called "stay-put" provision, which directs that a disabled child "shall remain in [his or her] then current educational placement" pending completion of any review proceedings, unless the parents and state or local educational agencies otherwise agree. 20 U.S.C. 1415(e)(3). Today we must decide whether, in the face of this statutory proscription, state or local school authorities may nevertheless unilaterally exclude

BEST COPY AVAILABLE

disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities. In addition, we are called upon to decide whether a district court may, in the exercise of its equitable powers, order a State to provide educational services directly to a disabled child when the local agency fails to do so.

I

In the Education of the Handicapped Act (EHA or the Act), 84 Stat. 175, as amended, 20 U.S.C. 1400 et seq., Congress sought "to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, [and] to assure that the rights of handicapped children and their parents or guardians are protected." 1400(c). When the law was passed in 1975, Congress had before it ample evidence that such legislative assurances were sorely needed: 21 years after this Court declared education to be "perhaps the most important function of state and local governments," Brown v. Board of Education, 347 U.S. 483, 493 (1954), Congressional studies revealed that better than half of the Nation's eight million disabled children were not receiving appropriate educational services. 1400(b)(3). Indeed, one out of every eight of these children was excluded from the public school system altogether, 1400(b)(4); many others were simply "warehoused" in special classes or were neglectfully shepherded through the system until they were old enough to drop out. See H. R. Rep. No. 94-332, p. 2 (1975). Among the most poorly served of disabled students were emotionally disturbed children: Congressional statistics revealed that for the school year immediately preceding passage of the Act, the educational needs of 82 percent of all children with emotional disabilities went unmet. See S. Rep. No. 94-168, p. 8 (1975) (hereinafter S. Rep.).

Although these educational failings resulted in part from funding constraints, Congress recognized that the problem reflected more than a lack of financial resources at the state and local levels. Two federal-court decisions, which the Senate Report characterized as "landmark," see id., at 6, demonstrated that many disabled children were excluded pursuant to state statutes or local rules and policies, typically without any consultation with, or even notice to, their parents. See Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (DC 1972); Pennsylvania Assn. for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (ED Pa. 1971), and 343 F. Supp. 279 (1972) (PARC). Indeed, by the time of the EHA's enactment, parents had brought legal challenges to similar exclusionary practices in 27 other states. See S. Rep., at 6.

In responding to these problems, Congress did not content itself with passage of a simple funding statute. Rather, the EHA confers upon disabled students an enforceable substantive right to public education in participating States, see Board of Education of

Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176 (1982),[1] and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act. Accordingly, States seeking to qualify for federal funds must develop policies assuring all disabled children the "right to a free appropriate public education," and must file with the Secretary of Education formal plans mapping out in detail the programs, procedures and timetables under which they will effectuate these policies. 20 U.S.C. 1412(1), 1413(a). Such plans must assure that, "to the maximum extent appropriate," States will "mainstream" disabled children, i.e., that they will educate them with children who are not disabled, and that they will segregate or otherwise remove such children from the regular classroom setting "only when the nature or severity of the handicap is such that education in regular classes . . . cannot be achieved satisfactorily." 1412(5).

The primary vehicle for implementing these congressional goals is the "individualized educational program" (IEP), which the EHA mandates for each disabled child. Prepared at meetings between a representative of the local school district, the child's teacher, the parents or guardians, and, whenever appropriate, the disabled child, the IEP sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives. 1401(19). The IEP must be reviewed and, where necessary, revised at least once a year in order to ensure that local agencies tailor the statutorily required "free appropriate public education" to each child's unique needs. 1414(a)(5).

Envisioning the IEP as the centerpiece of the statute's education delivery system for disabled children, and aware that schools had all too often denied such children appropriate educations without in any way consulting their parents, Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness. See 1400(c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E), and 1415(b)(2). Accordingly, the Act establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate. These safeguards include the right to examine all relevant records pertaining to the identification, evaluation and educational placement of their child; prior written notice whenever the responsible educational agency proposes (or refuses) to change the child's placement or program; an opportunity to present complaints concerning any aspect of the local agency's provision of a free appropriate public education; and an

opportunity for "an impartial due process hearing" with respect to any such complaints. 1415(b)(1), (2).
At the conclusion of any such hearing, both the parents and the local educational agency may seek further administrative review and, where that proves unsatisfactory, may file a civil action in any state or federal court. 1415(c), (e)(2). In addition to reviewing the administrative record, courts are empowered to take additional evidence at the request of either party and to "grant such relief as [they] determine[] is appropriate." 1415(e)(2). The "stay-put" provision at issue in this case governs the placement of a child while these often lengthy review procedures run their course. It directs that:

> "During the pendency of any proceedings conducted pursuant to [1415], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . . ." 1415(e)(3).

The present dispute grows out of the efforts of certain officials of the San Francisco Unified School District (SFUSD) to expel two emotionally disturbed children from school indefinitely for violent and disruptive conduct related to their disabilities. In November 1980, respondent John Doe assaulted another student at the Louise Lombard School, a developmental center for disabled children. Doe's April 1980 IEP identified him as a socially and physically awkward 17 year old who experienced considerable difficulty controlling his impulses and anger. Among the goals set out in his IEP was "[i]mprovement in [his] ability to relate to [his] peers [and to] cope with frustrating situations without resorting to aggressive acts." App. 17. Frustrating situations, however, were an unfortunately prominent feature of Doe's school career: physical abnormalities, speech difficulties, and poor grooming habits had made him the target of teasing and ridicule as early as the first grade, id., at 23; his 1980 IEP reflected his continuing difficulties with peers, noting that his social skills had deteriorated and that he could tolerate only minor frustration before exploding. Id., at 15-16.

On November 6, 1980, Doe responded to the taunts of a fellow student in precisely the explosive manner anticipated by his IEP: he choked the student with sufficient force to leave abrasions on the child's neck, and kicked out a school window while being escorted to the principal's office afterwards. Id., at 208. Doe admitted his misconduct and the school subsequently suspended him for five days. Thereafter, his principal referred the matter to the SFUSD Student Placement Committee (SPC or Committee) with the recommendation that Doe be expelled. On the day the suspension was to end, the SPC notified Doe's mother that it was proposing to exclude her child permanently from SFUSD and was therefore extending his suspension until such time as the expulsion proceedings were completed.[2] The Committee further advised her that she was entitled to attend the November 25 hearing at which it planned to discuss the proposed expulsion.

After unsuccessfully protesting these actions by letter, Doe brought this suit against a host of local school officials and the state superintendent of public education. Alleging that the suspension and proposed expulsion violated the EHA, he sought a temporary restraining order cancelling the SPC hearing and requiring school officials to convene an IEP meeting. The District Judge granted the requested injunctive relief and further ordered defendants to provide home tutoring for Doe on an interim basis; shortly thereafter, she issued a preliminary injunction directing defendants to return Doe to his then current educational placement at Louise Lombard School pending completion of the IEP review process. Doe re-entered school on December 15, 5 1/2 weeks, and 24 school days, after his initial suspension.

Respondent Jack Smith was identified as an emotionally disturbed child by the time he entered the second grade in 1976. School records prepared that year indicated that he was unable "to control verbal or physical outburst[s]" and exhibited a "[s]evere disturbance in relationships with peers and adults." Id., at 123. Further evaluations subsequently revealed that he had been physically and emotionally abused as an infant and young child and that, despite above average intelligence, he experienced academic and social difficulties as a result of extreme hyperactivity and low self-esteem. Id., at 136, 139, 155, 176. Of particular concern was Smith's propensity for verbal hostility; one evaluator noted that the child reacted to stress by "attempt[ing] to cover his feelings of low self worth through aggressive behavior[,] . . . primarily verbal provocations." Id., at 136.

Based on these evaluations, SFUSD placed Smith in a learning center for emotionally disturbed children. His grandparents, however, believed that his needs would be better served in the public school setting and, in September 1979, the school district acceded to their requests and enrolled him at A. P. Giannini Middle School. His February 1980 IEP recommended placement in a Learning Disability Group, stressing the need for close supervision and a highly structured environment. Id., at 111. Like earlier evaluations, the February 1980 IEP noted that Smith was easily distracted, impulsive, and anxious; it therefore proposed a half-day schedule and suggested that the placement be undertaken on a trial basis. Id., at 112, 115.

At the beginning of the next school year, Smith was assigned to a full-day program; almost immediately thereafter he began misbehaving. School officials met twice with his grandparents in October 1980 to discuss returning him to a half-day program;

although the grandparents agreed to the reduction, they apparently were never apprised of their right to challenge the decision through EHA procedures. The school officials also warned them that if the child continued his disruptive behavior--which included stealing, extorting money from fellow students, and making sexual comments to female classmates--they would seek to expel him. On November 14, they made good on this threat, suspending Smith for five days after he made further lewd comments. His principal referred the matter to the SPC, which recommended exclusion from SFUSD. As it did in John Doe's case, the Committee scheduled a hearing and extended the suspension indefinitely pending a final disposition in the matter. On November 28, Smith's counsel protested these actions on grounds essentially identical to those raised by Doe, and the SPC agreed to cancel the hearing and to return Smith to a half-day program at A. P. Giannini or to provide home tutoring. Smith's grandparents chose the latter option and the school began home instruction on December 10; on January 6, 1981, an IEP team convened to discuss alternative placements.

After learning of Doe's action, Smith sought and obtained leave to intervene in the suit. The District Court subsequently entered summary judgment in favor of respondents on their EHA claims and issued a permanent injunction. In a series of decisions, the District Judge found that the proposed expulsions and indefinite suspensions of respondents for conduct attributable to their disabilities deprived them of their congressionally mandated right to a free appropriate public education, as well as their right to have that education provided in accordance with the procedures set out in the EHA. The District Judge therefore permanently enjoined the school district from taking any disciplinary action other than a two- or five-day suspension against any disabled child for disability-related misconduct, or from effecting any other change in the educational placement of any such child without parental consent pending completion of any EHA proceedings. In addition, the judge barred the State from authorizing unilateral placement changes and directed it to establish an EHA compliance-monitoring system or, alternatively, to enact guidelines governing local school responses to disability-related misconduct. Finally, the judge ordered the State to provide services directly to disabled children when, in any individual case, the State determined that the local educational agency was unable or unwilling to do so.

On appeal, the Court of Appeals for the Ninth Circuit affirmed the orders with slight modifications. Doe v. Maher, 793 F.2d 1470 (1986). Agreeing with the District Court that an indefinite suspension in aid of expulsion constitutes a prohibited "change in placement" under 1415(e)(3), the Court of Appeals held that the stay-put provision admitted of no "dangerousness" exception and that the statute therefore rendered invalid those provisions of the California Education Code permitting the indefinite suspension or expulsion of disabled children for misconduct arising out of their disabilities. The court concluded, however, that fixed suspensions of up to 30 school days did not fall within the reach of 1415(e)(3), and therefore upheld recent amendments to the state education code authorizing such suspensions.[3] Lastly, the court affirmed that portion of the injunction requiring the State to provide services directly to a disabled child when the local educational agency fails to do so.

Petitioner Bill Honig, California Superintendent of Public Instruction,[4] sought review in this Court, claiming that the Court of Appeals' construction of the stay-put provision conflicted with that of several other courts of appeals which had recognized a dangerousness exception, compare Doe v. Maher, 793 F. 2d 1470 (1986) (case below), with Jackson v. Franklin County School Board, 765 F. 2d 535, 538 (CA5 1985); Victoria L. v. District School Bd. of Lee County, Fla., 741 F.2d 369, 374 (CA 11 1984); S-1 v. Turlington, 635 F.2d 342, 348, n. 9 (CA5), cert. denied, 454 U.S. 1030 (1981), and that the direct services ruling placed an intolerable burden on the State. We granted certiorari to resolve these questions, 479 U.S. ___ (1987), and now affirm.

II

At the outset, we address the suggestion, raised for the first time during oral argument, that this case is moot.[5] Under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies. Nebraska Press Assn v. Stuart, 427 U.S. 539, 546 (1976); Preiser v. Newkirk, 422 U.S. 395, 401 (1975). That the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires. Steffel v. Thompson, 415 U.S. 452, 459, n. 10 (1974); Roe v. Wade, 410 U.S. 113, 125 (1973). In the present case, we have jurisdiction if there is a reasonable likelihood that respondents will again suffer the deprivation of EHA-mandated rights that gave rise to this suit. We believe that, at least with respect to respondent Smith, such a possibility does in fact exist and that the case therefore remains justiciable.

Respondent John Doe is now 24 years old and, accordingly, is no longer entitled to the protections and benefits of the EHA, which limits eligibility to disabled children between the ages of three and 21. See 20 U.S.C. Sec. 1412(2)(B). It is clear, therefore, that whatever rights to state educational services he may yet have as a ward of the State, see Tr. of Oral Arg. 23, 26, the Act would not govern the State's provision of those services, and thus the case is moot as to him. Respondent Jack Smith, however, is currently 20 and has not yet completed high school. Although at present he is not faced with any proposed expulsion or suspension proceedings, and indeed no longer even resides within the SFUSD, he remains a resident of California and is entitled to a "free appropriate public education" within that State. His claims under the EHA, therefore, are not moot if the conduct he originally complained of is "'capable of repetition, yet evading review.'" Murphy v. Hunt, 455 U.S. 478, 482 (1982). Given Smith's continued eligibility for educational services under the EHA,6 the nature of his disability, and petitioner's insistence that all local school districts retain residual authority to exclude disabled children for dangerous conduct, we have little difficulty concluding that there is a "reasonable expectation," ibid., that Smith would once again be subjected to a unilteral "change in placement" for conduct growing out of his disabilities were it not for the state-wide injunctive relief issued below.

Our cases reveal that, for purposes of assessing the likelihood that state authorities will re-inflict a given injury, we generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury. See Los Angeles v. Lyons, 461 U.S. 95, 105-106 (1983) (no threat that party seeking injunction barring police use of chokeholds would be stopped again for traffic violation or other offense, or would resist arrest if stopped); Hunt v. Murphy, supra, at 484 (no reason to believe that party challenging denial of pre-trial bail "will once again be in a position to demand bail"); O'Shea v. Littleton, 414 U.S. 488, 497 (1974) (unlikely that parties challenging discriminatory bond-setting, sentencing, and jury-fee practices would again violate valid criminal laws). No such reluctance, however, is warranted here. It is respondent Smith's very inability to conform his conduct to socially acceptable norms that renders him "handicapped" within the meaning of the EHA. See 20 U.S.C. 1401(1); 34 CFR 300.5(b)(8) (1987). As noted above, the record is replete with evidence that Smith is unable to govern his aggressive, impulsive behavior--indeed, his notice of suspension acknowledged that "Jack's actions seem beyond his control." App. 152. In the absence of any suggestion that respondent has overcome his earlier difficulties, it is certainly reasonable to expect, based on his prior history of behavioral problems, that he will again engage in classroom misconduct. Nor is it reasonable to suppose that Smith's future educational placement will so perfectly suit his emotional and academic needs that further disruptions on his part are improbable. Although Justice Scalia suggests in his dissent, post, at 3, that school officials are unlikely to place Smith in a setting where they cannot control his misbehavior, any efforts to ensure such total control must be tempered by the school system's statutory obligations to provide respondent with a free appropriate public education in "the least restrictive environment," 34 CFR 300.552(d) (1987); to educate him, "to the maximum extent appropriate," with children who are not disabled, 20 U.S.C. 1412(5); and to consult with his parents or guardians, and presumably with respondent himself, before choosing a placement. 1401(19), 1415(b). Indeed, it is only by ignoring these mandates, as well as Congress' unquestioned desire to wrest from school officials their former unilateral authority to determine the placement of emotionally disturbed children, see infra, at 15-16, that the dissent can so readily assume that respondent's future placement will satisfactorily prevent any further dangerous conduct on his part. Overarching these statutory obligations, moreover, is the inescapable fact that the preparation of an IEP, like any other effort at predicting human behavior, is an inexact science at best. Given the unique circumstances and context of this case, therefore, we think it reasonable to expect that respondent will again engage in the type of misconduct that precipitated this suit.

We think it equally probable that, should he do so, respondent will again be subjected to the same unilateral school action for which he initially sought relief. In this regard, it matters not that Smith no longer resides within the SFUSD. While the actions of SFUSD officials first gave rise to this litigation, the District Judge expressly found that the lack of a state policy governing local school responses to disability-related misconduct had led to, and would continue to result in, EHA violations, and she therefore enjoined the state defendant from authorizing, among other things, unilateral placement changes. App. 247-248. She of course also issued injunctions directed at the local defendants, but they did not seek review of those orders in this Court. Only petitioner, the State Superintendent of Public Instruction, has invoked our jurisdiction, and he now urges us to hold that local school districts retain unilateral authority under the EHA to suspend or otherwise remove disabled children for dangerous conduct. Given these representations, we have every reason to believe that were it not for the injunction barring petitioner from authorizing such unilateral action, respondent would be faced with a real and substantial threat of such action in any California school district in which he enrolled. Cf. Los Angeles v. Lyons, supra, at 106 (respondent lacked standing to seek injunctive relief because he could not plausibly allege that police officers choked all persons whom they stopped, or that the City "AUTHORIZED police officers to act in such manner" (emphasis added)). Certainly, if the SFUSD's past practice of unilateral exclusions was at odds with state policy and the practice of local school districts generally, petitioner would not now stand before us seeking to defend the right of all local school districts to engage in such aberrant behavior.7

We have previously noted that administrative and judicial review under the EHA is often "ponderous," Burlington School Committee v. Massachusetts Dept. of Education, 471 U.S. 359, 370 (1985), and this case, which has taken seven years to reach us, amply confirms that observation. For obvious reasons, the misconduct of an emotionally disturbed or otherwise disabled child who has not yet reached adolescence typically will not pose such a serious threat to the well-being of other students that school officials can only ensure classroom safety by excluding the child. Yet, the adolescent student improperly disciplined for misconduct that does pose such a threat will often be finished with school or otherwise ineligible for EHA protections by the time review can be had in this Court. Because we believe that respondent Smith has demonstrated both "a sufficient likelihood that he we will again be wronged in a similar way," Los Angeles v. Lyons, 461 U.S., at 111, and that any resulting claim he may have for relief will surely evade our review, we turn to the merits of his case.

III

The language of 1415(e)(3) is unequivocal. It states plainly that during the pendency of any proceedings initiated under the Act, unless the state or local educational agency and the parents or guardian of a disabled child otherwise agree, "the child SHALL remain in the then current educational placement." 1415(e)(3) (emphasis added). Faced with this clear directive, petitioner asks us to read a "dangerousness" exception into the stay-put provision on the basis of either of two essentially inconsistent assumptions: first, that Congress thought the residual authority of school officials to exclude dangerous students from the classroom too obvious for comment; or second, that Congress inadvertently failed to provide such authority and this Court must therefore remedy the oversight. Because we cannot accept either premise, we decline petitioner's invitation to re-write the statute.

Petitioner's arguments proceed, he suggests, from a simple, common-sense proposition: Congress could not have intended the stay-put provision to be read literally, for such a construction leads to the clearly unintended, and untenable, result that school districts must return violent or dangerous students to school while the often lengthy EHA proceedings run their course. We think it clear, however, that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts.

As noted above, Congress passed the EHA after finding that school systems across the country had excluded one out of every eight disabled children from classes. In drafting the law, Congress was largely guided by the recent decisions in Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (1972), and PARC, 343 F. Supp. 279 (1972), both of which involved the exclusion of hard-to-handle disabled students. Mills in particular demonstrated the extent to which schools used disciplinary measures to bar children from the classroom. There, school officials had labeled four of the seven minor plaintiffs "behavioral problems," and had excluded them from classes without providing any alternative education to them or any notice to their parents. 348 F. Supp., at 869-870. After finding that this practice was not limited to the named plaintiffs but affected in one way or another an estimated class of 12,000 to 18,000 disabled students, id., at 868-869, 875, the District Court enjoined future exclusions, suspensions, or expulsions "on grounds of discipline." Id., at 880.

Congress attacked such exclusionary practices in a variety of ways. It required participating States to educate all disabled children, regardless of the severity of their disabilities, 20 U.S.C. 1412(2)(C), and included within the definition of "handicapped" those children with serious emotional disturbances. 1401(1). It further provided for meaningful parental participation in all aspects of a child's educational placement, and barred schools, through the stay-put provision, from changing that placement over the parent's objection until all review proceedings were completed. Recognizing that those proceedings might prove long and tedious, the Act's drafters did not intend 1415(e)(3) to operate inflexibly, see 121 Cong. Rec. 37412 (1975) (remarks of Sen. Stafford), and they therefore allowed for interim placements where parents and school officials are able to agree on one. Conspicuously absent from 1415(e)(3), however, is any emergency exception for dangerous students. This absence is all the more telling in light of the injunctive decree issued in PARC, which permitted school officials unilaterally to remove students in "'extraordinary circumstances.'" 343 F. Supp., at 301. Given the lack of any similar exception in Mills, and the close attention Congress devoted to these "landmark" decisions, see S. Rep., at 6, we can only conclude that the omission was intentional; we are therefore not at liberty to engraft onto the statute an exception Congress chose not to create.

Our conclusion that 1415(e)(3) means what it says does not leave educators hamstrung. The Department of Education has observed that, "[w]hile the [child's] placement may not be changed [during any complaint proceeding], this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others." Comment following 34 CFR 300.513 (1987). Such procedures may include the use of study carrels, time-outs, detention, or the restriction of privileges. More drastically, where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 school days.[8] This authority, which respondent in no way disputes, not only ensures that school administrators can protect the safety of others by promptly removing the most dangerous of students, it also provides a "cooling down" period during which officials can initiate IEP review and seek to persuade the child's parents to agree to an interim placement. And in those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts under 1415(e)(2), which empowers courts to grant any appropriate relief.

Petitioner contends, however, that the availability of judicial relief is more illusory than real, because a party seeking review under 1415(e)(2) must exhaust time-consuming administrative remedies, and because under the Court of Appeals' construction of 1415(e)(3), courts are as bound by the stay-put provision's "automatic injunction," 793 F.2d, at 1486, as are schools.[9] It is true that judicial review is normally not available under 1415(e)(2) until all administrative proceedings are completed, but as we have previously noted, parents may by-pass the administrative process where exhaustion would be futile or inadequate. See Smith v. Robinson, 468 U.S. 992, 1014, n. 17 (1984) (citing cases); see also 121 Cong. Rec. 37416 (1975) (remarks of Sen. Williams) ("[E]xhaustion . . . should not be required . . . in cases where such exhaustion would be futile either as a legal or practical matter"). While may of the EHA's procedural safeguards protect the rights of parents and children, schools can and do seek redress through the administrative review process, and we have no reason to believe that Congress meant to require schools alone to exhaust in all cases, no matter how exigent the circumstances. The burden in such cases, of course, rests with the school to demonstrate the futility or inadequacy of administrative review, but nothing in 1415(e)(2) suggests that schools are completely barred from attempting to make such a showing. Nor do we think that 1415(e)(3) operates to limit the equitable powers of district courts such that they cannot, in appropriate cases, temporarily enjoin a dangerous disabled child from attending school. As the EHA's legislative history makes clear, one of the evils Congress sought to remedy was the unilateral exclusion of disabled children by SCHOOLS, not courts, and one of the purposes of 1415(e)(3), therefore, was "to prevent SCHOOL officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings." Burlington School Committee v. Massachusetts Dept. of Education, 471 U.S., at 373 (emphasis added). The stay-put provision in no way purports to limit or pre-empt the authority conferred on courts by 1415(e)(2), see Doe v. Brookline School Committee, 722 F.2d 910, 917 (CA1 1983); indeed, it says nothing whatever about judicial power.

In short, then, we believe that school officials are entitled to seek injunctive relief under 1415(e)(2) in appropriate cases. In any such action, 1415(e)(3) effectively creates a presumption in favor of the child's current educational placement which school officials can overcome only by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others. In the present case, we are satisfied that the District Court, in enjoining the state and local defendants from indefinitely suspending respondent or otherwise unilaterally altering his then current placement, properly balanced respondent's interest in receiving a free appropriate public education in accordance with the procedures and requirements of the EHA against the interests of the state and local school officials in maintaining a safe learning environment for all their students.10

IV

We believe the courts below properly construed and applied 1415(e)(3), except insofar as the Court of Appeals held that a suspension in excess of 10 school days does not constitute a "change in placement."11 We therefore affirm the Court of Appeals' judgment on this issue as modified herein. Because we are equally divided on the question whether a court may order a State to provide services directly to a disabled child where the local agency has failed to do so, we affirm the Court of Appeals' judgment on this issue as well.

Affirmed.

1 Congress' earlier efforts to ensure that disabled students received adequate public education had failed in part because the measures it adopted were largely hortatory. In the 1966 amendments to the Elementary and Secondary Education Act of 1965, Congress established a grant program "for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children." Pub. L. 89-750, 161, 80 Stat. 1204. It repealed that program four years later and replaced it with the original version of the Education of the Handicapped Act, Pub. L. 91-230, 84 Stat. 175, Part B of which contained a similar grant program. Neither statute, however, provided specific guidance as to how States were to use the funds, nor did they condition the availability of the grants on compliance with any procedural or substantive safeguards. In amending the EHA to its present form, Congress rejected its earlier policy of "merely establish[ing] an unenforceable goal requiring all children to be in school." 121 Cong. Rec. 37417 (1975) (remarks of Sen. Schweiker). Today, all 50 states and the District of Columbia receive funding assistance under the EHA. U.S. Dept. of Education, Ninth Annual Report to Congress on Implementation of Education of the Handicapped Act (1987).

2 California law at the time empowered school principals to suspend students for no more than five consecutive school days, Cal. Educ. Code Ann. 48903(a) (West 1978), but permitted school districts seeking to expel a suspended student to "extend the suspension until such time as [expulsion proceedings were completed]; provided, that [it] has determined that the presence of the pupil at the school or in an alternative school placement would cause a danger to persons or property or a threat of disrupting the instructional process." 48903(h). The State subsequently amended the law to permit school districts to impose longer initial periods of suspension. See n. 3, infra.

3 In 1983, the State amended its Education Code to permit school districts to impose initial suspensions of 20, and in certain circumstances, 30 school days. Cal. Educ. Code Ann. 48912(a), 48903 (West Supp. 1988). The legislature did not alter the indefinite suspension authority which the SPC exercised in this case, but simply incorporated the earlier provision into a new section. See 48911(g).

4 At the time respondent Doe initiated this suit, Wilson Riles was the California Superintendent of Public Instruction. Petitioner Honig succeeded him in office.

5 We note that both petitioner and respondents believe that this case presents a live controversy. See Tr. of Oral Arg. 6, 27-31. Only the United States, appearing as amicus curiae, urges that the case is presently nonjusticiable. Id., at 21.

6 Notwithstanding respondent's undisputed right to a free appropriate public education in California, Justice Scalia argues in dissent that there is no "demonstrated probability" that Smith will actually avail himself of that right because his counsel was unable to state affirmatively during oral argument that her client would seek to re-enter the state school system. See post, at 2. We believe the dissent overstates the stringency of the "capable of repetition" test. Although Justice Scalia equates "reasonable expectation" with "demonstrated probability," the very case he cites for this proposition described these standards in the distinctive, see Murphy v. Hunt, 455 U.S., at 482 ("[T]here must be a 'reasonable expectation' OR a 'demonstrated probability' that the same controversy will recur" (emphasis added)), and in numerous cases decided both before and since Hunt we have found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable. See e.g., Burlington Northern R. Co. v. Maintenance of Way Employees, 481 U.S. ____, ____, n. 4 (1987) (parties "reasonably likely" to find themselves in future disputes over collective bargaining agreement); California Coastal Comm'n v. Granite Rock Co., 480 U.S. ____, ____ (1987) (O'Connor, J.) ("likely" that respondent would again submit mining plans that would trigger contested state permit requirement); Press-Enterprise Co. v. Superior Court of Cal., Riverside County, 478 U.S. 1, 6 (1986) ("It can reasonably be assumed" that newspaper publisher will be subjected to similar closure order in the future); Globe Newspaper Co. v. Superior Court of Norfolk County, 457 U.S. 596, 603 (1982) (same); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 398 (1980) (case not moot where litigant "faces some likelihood of becoming involved in same controversy in the future") (dicta). Our concern in these cases, as in all others involving potentially moot claims, was whether the controversy was capable of repetition and not, as the dissent seems to insist, whether the claimant had demonstrated that a recurrence of the dispute was more probable than not. Regardless, then, of whether respondent has established with mathematical precision the

likelihood that he will enroll in public school during the next two years, we think there is at the very least a reasonable expectation that he will exercise his rights under the EHA. In this regard, we believe respondent's actions over the course of the last seven years speak louder than his counsel's momentary equivocation during oral argument. Since 1980, he has sought to vindicate his right to an appropriate public education that is not only free of charge, but free from the threat that school officials will unilaterally change his placement or exclude him from class altogether. As a disabled young man, he has as at least as great a need of a high school education and diploma as any of his peers, and his counsel advises us that he is awaiting the outcome of this case to decide whether to pursue his degree. Tr. Oral Arg. 23-24. Under these circumstances, we think it not only counterintuitive but unreasonable to assume that respondent will forgo the exercise of a right that he has for so long sought to defend. Certainly we have as much reason to expect that respondent will re-enter the California school system as we had to assume that Jane Roe would again both have an unwanted pregnancy and wish to exercise her right to an abortion. See Roe v. Wade, 410 U.S. 113, 125 (1973).

7 Petitioner concedes that the school district "made a number of procedural mistakes in its eagerness to protect other students from Doe and Smith." Reply Brief for Petitioner 6. According to petitioner, however, unilaterally excluding respondents from school was not among them; indeed, petitioner insists that the SFUSD acted properly in removing respondents and urges that the stay-put provision "should not be interpreted to require a school district to maintain such dangerous children with other children." Id., at 6-7.

8 The Department of Education has adopted the position first espoused in 1980 by its Office of Civil Rights that a suspension of up to 10 school days does not amount to a "change in placement" prohibited by 1415(e)(3). U.S. Dept. of Education, Office of Special Education Programs, Policy Letter (Feb. 26, 1987), Ed. for Handicapped L. Rep. 211:437 (1987). The EHA nowhere defines the phrase "change in placement," nor does the statute's structure or legislative history provide any guidance as to how the term applies to fixed suspensions. Given this ambiguity, we defer to the construction adopted by the agency charged with monitoring and enforcing the statute. See INS v. Cardoza-Fonseca, 480 U.S. ____, ____ (1987). Moreover, the agency's position comports fully with the purposes of the statute: Congress sought to prevent schools from permanently and unilaterally excluding disabled children by means of indefinite suspensions and expulsions; the power to impose fixed suspensions of short duration does not carry the potential for total exclusion that Congress found so objectionable. Indeed, despite its broad injunction, the District Court in Mills v. Board of Education of District of Columbia, 348

F. Supp. 866 (DC 1972), recognized that school officials could suspend disabled children on a short-term, temporary basis. See id, at 880. Cf. Goss v. Lopez, 419 U.S. 565, 574-576, (1975) (suspension of 10 school days or more works a sufficient deprivation of property and liberty interests to trigger the protections of the Due Process Clause). Because we believe the agency correctly determined that a suspension in excess of 10 days does constitute a prohibited "change in placement," we conclude that the Court of Appeals erred to the extent it approved suspensions of 20 and 30 days' duration.

9 Petitioner also notes that in California, schools may not suspend any given student for more than a total of 20, and in certain special circumstances 30, school days in a single year, see Cal. Educ. Code Ann. 48903 (West Supp. 1988); he argues, therefore, that a school district may not have the option of imposing a 10-day suspension when dealing with an obstreperous child whose previous suspensions for the year total 18 or 19 days. The fact remains, however, that state law does not define the scope of 1415(e)(3). There may be cases in which a suspension that is otherwise valid under the stay-put provision would violate local law. The effect of such a violation, however, is a question of state law upon which we express no view.

10 We therefore reject the United States' contention that the District Judge abused her discretion in enjoining the local school officials from indefinitely suspending respondent pending completion of the expulsion proceedings. Contrary to the Government's suggestion, the District Judge did not view herself bound to enjoin any and all violations of the stay-put provision, but rather, consistent with the analysis we set out above, weighed the relative harms to the parties and found that the balance tipped decidedly in favor of respondent. App. 222-223. We of course do not sit to review the factual determinations underlying that conclusion. We do note, however, that in balancing the parties' respective interests, the District Judge gave proper consideration to respondent's rights under the EHA. While the Government complains that the District Court indulged an improper presumption of irreparable harm to respondent, we do not believe that school officials can escape the presumptive effect of the stay-put provision simply by violating it and forcing parents to petition for relief. In any suit brought by parents seeking injunctive relief for a violation of 1415(e)(3), the burden rests with the school district to demonstrate that the educational status quo must be altered.

11 See n. 8, supra.

Chief Justice Rehnquist, concurring.

I write separately on the mootness issue in this case to explain why I have joined Part II of the Court's opinion, and why I think reconsideration of our mootness jurisprudence may be in order when dealing with cases decided by this Court.

The present rule in federal cases is that an actual controversy must exist at all stages of appellate review, not merely at the time the complaint is filed. This doctrine was clearly articulated in United States v. Munsingwear, 340 U.S. 36 (1950), in which Justice Douglas noted that "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." Id., at 39. The rule has been followed fairly consistently over the last 30 years. See, e.g., Preiser v. Newkirk, 422 U.S. 395 (1975); SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972).

All agree that this case was "very much alive," ante, at 10, when the action was filed in the District Court, and very probably when the Court of Appeals decided the case. It is supervening events since the decision of the Court of Appeals which have caused the dispute between the majority and the dissent over whether this case is moot. Therefore, all that the Court actually holds is that these supervening events do not deprive this Court of the authority to hear the case. I agree with that holding, and would go still further in the direction of relaxing the test of mootness where the events giving rise to the claim of mootness have occurred after our decision to grant certiorari or to note probable jurisdiction.

The Court implies in its opinion, and the dissent expressly states, that the mootness doctrine is based upon Art. III of the Constitution. There is no doubt that our recent cases have taken that position. See Nebraska Press Assn. v. Stuart, 427 U.S. 539, 546 (1976); Preiser v. Newkirk, supra, at 401; Sibron v. New York, 392 U.S. 40, 57 (1968); Liner v. Jafco, Inc., 375 U.S. 301, 306, n. 3 (1964). But it seems very doubtful that the earliest case I have found discussing mootness, Mills v. Green, 159 U.S. 651 (1895), was premised on constitutional constraints; Justice Gray's opinion in that case nowhere mentions Art. III.

If it were indeed Art. III which--by reason of its requirement of a case or controversy for the exercise of federal judicial power--underlies the mootness doctrine, the "capable of repetition, yet evading review" exception relied upon by the Court in this case would be incomprehensible. Article III extends the judicial power of the United States only to cases and controversies; it does not except from this requirement other lawsuits which are "capable of repetition, yet evading review." If our mootness doctrine were forced upon us by the case or controversy requirement of Art. III itself, we would have no more power to decide lawsuits which are "moot" but which also raise questions which are capable of repetition but evading review than we would to decide cases which are "moot" but raise no such questions.

The exception to mootness for cases which are "capable of repetition, yet evading review," was first stated by this Court in Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911). There the Court enunciated the exception in the light of obvious pragmatic considerations, with no mention of Art. III as the principle underlying the mootness doctrine:

"The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress." Id., at 515.

The exception was explained again in Moore v. Ogilvie, 394 U.S. 814, 816 (1969):

"The problem is therefore 'capable of repetition, yet evading review.' The need for its resolution thus reflects a continuing controversy in the federal-state area where our 'one man, one vote' decisions have thrust" (citation omitted).

It is also worth noting that Moore v. Ogilvie involved a question which had been mooted by an election, just as did Mills v. Green some 70 years earlier. But at the time of Mills, the case originally enunciating the mootness doctrine, there was no thought of any exception for cases which were "capable of repeition, yet evading review."

The logical conclusion to be drawn from these cases, and from the historical development of the principle of mootness, is that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it. The "capable of repetition, yet evading review" exception is an example. So too is our refusal to dismiss as moot those cases in which the defendant voluntarily ceases, at some advanced stage of the appellate proceedings, whatever activity prompted the plaintiff to seek an injunction. See, e.g., City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289, n. 10 (1982); United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953). I believe that we should adopt an additional exception to our present mootness doctrine for those cases where the events which render the case moot have supervened since our grant of certiorari or noting of probable jurisdiction in the case. Dissents from denial of certiorari in this Court illustrate the proposition that the roughly 150 or 160 cases which we decide each year on the merits are less than the number of cases warranting review by us if we are to remain, as Chief Justice Taft said many years ago, "the last word on every important issue under the Constitution and the statutes of the United States." But these unique resources--the time spent preparing to decide the case by reading briefs, hearing oral argument, and conferring--are squandered in every case in which it becomes apparent after the decisional process is underway that we may not reach the question presented. To me the unique and valuable ability of this Court to decide a case--we are, at present, the only Art. III court which can decide a federal question in which a way as to bind all other courts--is a sufficient reason either to abandon the doctrine of mootness altogether in cases which this Court has decided to review, or at least to relax the doctrine of mootness in such a manner as the dissent accuses the majority of doing here. I would leave the mootness doctrine as established by our cases in full force and effect when applied to the earlier stages of a lawsuit, but I believe that once this Court has undertaken a consideration of a case, an exception to that principle is just as much warranted as where a case is "capable of repetition, yet evading review."

Justice Scalia, with whom Justice O'Connor joins, dissenting.

Without expressing any views on the merits of this case, I respectfully dissent because in my opinion we have no authority to decide it. I think the controversy is moot.

I

The Court correctly acknowledges that we have no power under Art. III of the Constitution to adjudicate a case that no longer presents an actual, ongoing dispute between the named parties. Ante, at 10, citing Nebraska Press Assn. v. Stuart, 427 U.S. 539, 546 (1976); Preiser v. Newkirk, 422 U.S. 395, 401 (1975). Here, there is obviously no present controversy between the parties, since both respondents are no longer in school and therefore no longer subject to a unilateral "change in placement." The Court concedes mootness with respect to respondent John Doe, who is now too old to receive the benefits of the Education of the Handicapped Act (EHA). Ante, at 11. It concludes, however, that the case is not moot as to respondent Jack Smith, who has two more years of eligibility but is no longer in the public schools, because the controversy is "capable of repetition, yet evading review." Ante, at 11-16.

Jurisdiction on the basis that a dispute is "capable of repetition, yet evading review" is limited to the "exceptional situatio[n]," Los Angeles v. Lyons, 461 U.S. 95, 109 (1983), where the following two circumstances simultaneously occur: "'(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be

BEST COPY AVAILABLE

subjected to the same action again.'" Murphy v. Hunt, 455 U.S. 478, 482 (1982) (per curiam), quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam). The second of these requirements is not met in this case.

For there to be a "reasonable expectation" that Smith will be subjected to the same action again, that event must be a "demonstrated probability." Murphy v. Hunt, supra, at 482, 483; Weinstein v. Bradford, supra, at 149. I am surprised by the Court's contention, fraught with potential for future mischief, that "reasonable expectation" is satisfied by something less than "demonstrated probability." Ante, at 11-12, n. 6. No one expects that to happen which he does not think probable; and his expectation cannot be shown to be reasonable unless the probability is demonstrated. Thus, as the Court notes, our cases recite the two descriptions side by side ("a 'reasonable expectation' or a 'demonstrated probability,'" Hunt, supra, at 482). The Court asserts, however, that these standards are "described . . . in the disjunctive," ante, at 11-12, n. 6--evidently believing that the conjunction "or" has no accepted usage except a disjunctive one, i.e., "expressing an alternative, contrast, or opposition," Webster's Third New International Dictionary 651 (1981). In fact, however, the conjunction is often used "to indicate . . . (3) the synonymous, equivalent, or substitutive character of two words or phrases

The prior holdings cited by the Court in a footnote, see ante, at 12, n. 6, offer no support for the novel proposition that less than a probability of recurrence is sufficient to avoid mootness. In Burlington Northern R. Co. v. Maintenance of Way Employees, ____ U.S. ____, ____, n. 4 (1987), we found that the same railroad and union were "reasonably likely" to find themselves in a recurring dispute over the same issue. Similarly, in California Coastal Comm'n v. Granite Rock Co., ____ U.S. ____, ____ (1987), we found it "likely" that the plaintiff mining company would submit new plans which the State would seek to subject to its coastal permit requirements. See Webster's Third New International Dictionary 1310 (1981) (defining "likely" as "of such a nature or so circumstanced as to make something probable[] . . . seeming to justify belief or expectation[] . . . in all probability"). In the cases involving exclusion orders issued to prevent the press from attending criminal trials, we found that "[i]t can reasonably be assumed" that a news organization covering the area in which the defendant court sat will again be subjected to that court's closure rules. Press-Enterprise Co. v. Superior Court of Cal., Riverside County, ____ U.S. ____, ____ (1986); Globe Newspaper Co. v. Superior Court of Norfolk County, 457 U.S. 596, 603 (1982). In these and other cases, one may quarrel, perhaps, with the accuracy of the Court's probability assessment; but there is no doubt that assessment was regarded as necessary to establish jurisdiction.

In Roe v. Wade, 410 U.S. 113, 125 (1973), we found that the "human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete," so that "pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied." Roe, at least one other abortion case, see Doe v. Bolton, 410 U.S. 179, 187 (1973), and some of our election law decisions, see Rosario v. Rockefeller, 410 U.S. 752, 756, n. 5 (1973); Dunn v. Blumstein, 405 U.S. 330, 333, n. 2 (1972), differ from the body of our mootness jurisprudence not in accepting less than a probability that the issue will recur, in a manner evading review, between the same parties; but in dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur between the defendant and the other members of the public at large without ever reaching us. Arguably those cases have been limited to their facts, or to the narrow areas of abortion and election rights, by our more recent insistence that, at least in the absence of a class action, the "capable of repetition" doctrine applies only where "there [is] a reasonable expectation that the SAME COMPLAINING PARTY would be subjected to the same action again." Hunt, 455 U.S., at 482 (emphasis added), quoting Weinstein, 423 U.S., at 149; see Burlington Northern R. Co., supra, at ____, n. 4; Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 187 (1979). If those earlier cases have not been so limited, however, the conditions for their application do not in any event exist here. There is no extraordinary improbability of the present issue's reaching us as a traditionally live controversy. It would have done so in this very case if Smith had not chosen to leave public school. In sum, on any analysis, the proposition the Court asserts in the present case--that probability need not be shown in order to establish the "same-party-recurrence" exception to mootness--is a significant departure from settled law.

II

If our established mode of analysis were followed, the conclusion that a live controversy exists in the present case would require a demonstrated probability that all of the following events will occur: (1) Smith will return to public school; (2) he will be placed in an educational setting that is unable to tolerate his dangerous behavior; (3) he will again engage in dangerous behavior; and (4) local school officials will again attempt unilaterally to change his placement and the state defendants will fail to prevent such action. The Court spends considerable time establishing that the last two of these events are likely to recur, but relegates to a footnote its discussion of the first event, upon which all others depend, and only briefly alludes to the second. Neither the facts in the record, nor even the extra-record assurances of counsel, establish a demonstrated probability of either of them.

With respect to whether Smith will return to school, at oral argument Smith's counsel forthrightly conceded that she "cannot represent whether in fact either of these students will ask for further education from the Petitioners." Tr. of Oral Arg. 23. Rather, she observed, respondents would "look to [our decision in this case] to find out what will happen after that." Id., at 23-24. When pressed, the most counsel would say was that, in her view, the 20-year-old Smith could seek to return to public school because he has not graduated, he is handicapped, and he has a right to an education. Id., at 27. I do not perceive the principle that would enable us to leap from the proposition that Smith could reenter public school to the conclusion that it is a demonstrated probability he will do so.

The Court nevertheless concludes that "there is at the very least a reasonable expectation" that Smith will return to school. Ante, at 12, n. 6. I cannot possibly dispute that on the basis of the Court's terminology. Once it is accepted that a "reasonable expectation" can exist without a demonstrable probability that the event in question will occur, the phrase has been deprived of all meaning, and the Court can give it whatever application it wishes without fear of effective contradiction. It is worth pointing out, however, how slim are the reeds upon which this conclusion of "reasonable expectation" (whatever that means) rests. The Court bases its determination on three observations from the record and oral argument. First, it notes that Smith has been pressing this lawsuit since 1980. It suffices to observe that the equivalent argument can be made in every case that remains active and pending; we have hitherto avoided equating the existence of a case or controversy with the existence of a lawsuit. Second, the Court observes that Smith has "as great a need of a high school education and diploma as any of his peers." Ibid. While this is undoubtedly good advice, it hardly establishes that the 20-year-old Smith is likely to return to high school, much less to public high school. Finally, the Court notes that counsel "advises us that [Smith] is awaiting the outcome of this case to decide whether to pursue his degree." Ibid. Not only do I not think this establishes a current case or controversy, I think it a most conclusive indication that no current case or controversy exists. We do not sit to broaden decision-making options, but to adjudicate the lawfulness of acts that have happened or, at most, are about to occur.

The conclusion that the case is moot is reinforced, moreover, when one considers that, even if Smith does return to public school, the controversy will still not recur unless he is again placed in an educational setting that is unable to tolerate his behavior. It seems to me not only not demonstrably probable, but indeed quite unlikely, given what is now known about Smith's behavioral problems, that local school authorities would again place him in an educational setting that could not control his dangerous conduct, causing a suspension that would replicate the legal issues in this suit. The majority dismisses this further contingency by noting that the school authorities have an obligation under the EHA to provide an "appropriate" education in "the least restrictive environment." Ante, at 14. This means, however, the least restrictive environment appropriate for the particular child. The Court observes that "the preparation of an [individualized educational placement]" is "an inexact science at best," ante, at 14, thereby implying that the school authorities are likely to get it wrong. Even accepting this assumption, which seems to me contrary to the premises of the Act, I see no reason further to assume that they will get it wrong by making the same mistake they did last time--assigning Smith to too unrestrictive an environment, from which he will thereafter be suspended--rather than by assigning him to too restrictive an environment. The latter, which seems to me more likely than the former (although both combined are much less likely than a correct placement), might produce a lawsuit, but not a lawsuit involving the issues that we have before us here.

III

The Chief Justice joins the majority opinion on the ground, not that this case is not moot, but that where the events giving rise to the mootness have occurred after we have granted certiorari we may disregard them, since mootness is only a prudential doctrine and not part of the "case or controversy" requirement of Art. III. I do not see how that can be. There is no more reason to intuit that mootness is merely a prudential doctrine than to intuit that initial standing is. Both doctrines have equivalently deep roots in the common-law understanding, and hence the constitutional understanding of what makes a matter appropriate for judicial disposition. See Flast v. Cohen, 392 U.S. 83, 95 (1968) (describing mootness and standing as various illustrations of the requirement of "justiciability" in Art. III).

The Chief Justice relies upon the fact that an 1895 case discussing mootness, Mills v. Green, 159 U.S. 651 (1895), makes no mention of the Constitution. But there is little doubt that the Court believed the doctrine called into question the Court's power and not merely its prudence, for (in an opinion by the same Justice who wrote Mills) it had said two years earlier:

"[T]he court is not EMPOWERED to decide moot questions or abstract propositions, or to declare . . . principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel . . . can enlarge the POWER, or affect the duty, of the court in this regard." California v. San Pablo & Tulare R. Co., 149 U.S. 308, 314 (1893) (Gray, J.) (emphasis added).

If it seems peculiar to the modern lawyer that our 19th century mootness cases make no explicit mention of Art. III, that is a peculiarity shared with our 19th century, and even our early 20th century, standing cases. As late as 1919, in dismissing a suit for lack of standing we said simply:

"Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." Blaire v. United States, 250 U.S. 273, 279 (1919).

See also, e.g., Standard Stock Food Co. v. Wright, 225 U.S. 540, 550 (1912); Southern Ry. Co. v. King, 217 U.S. 524, 534 (1910); Turpin v. Lemon, 187 U.S. 51, 60-61 (1902); Tyler v. Judges of Court of Registration, 179 U.S. 405, 409 (1900). The same is also true of our early cases dismissing actions lacking truly adverse parties, that is, collusive actions. See, e.g., Cleveland v. Chamberlain, 1 Black 419, 425-426 (1862); Lord v. Veazie, 8 How. 251, 254-256 (1850). The explanation for this ellipsis is that the courts simply chose to refer directly to the traditional, fundamental limitations upon the powers of common-law courts, rather than referring to Art. III which in turn adopts those limitations through terms ("The judicial Power"; "Cases"; "Controversies") that have virtually no meaning except by reference to that tradition. The ultimate circularity, coming back in the end to tradition, is evident in the statement by Justice Field:

"By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case." In re Pacific R. Commn., 32 F. 241, 255 (CCND Cal. 1887).

See also 2 M. Farrand, Records of the Federal Convention of 1787, p. 430 (rev. ed. 1966):

"Docr. Johnson moved to insert the words 'this Constitution and the' before the word 'laws'

"Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.

"The motion of Docr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature--"

In sum, I cannot believe that it is only our prudence, and nothing inherent in the understood nature of "The judicial Power," U.S. Const., Art. III, 1, that restrains us from pronouncing judgment in a case that the parties have settled, or a case involving a nonsurviving claim where the plaintiff has died, or a case where the law has been changed so that the basis of the dispute no longer exists, or a case where conduct sought to be enjoined has ceased and will not recur. Where the conduct has ceased for the time being but there is a demonstrated probability that it will recur, a real-life controversy between parties with a personal stake in the outcome continues to exist, and Art. III is no more violated than it is violated by entertaining a declaratory judgment action. But that is the limit of our power. I agree with The Chief Justice to this extent: the "yet evading review" portion of our "capable of repetition yet evading review" test is prudential; whether or not that criterion is met, a justiciable controversy exists. But the probability of recurrence between the same parties is essential to our jurisdiction as a court, and it is that deficiency which the case before us presents.

* * * *

It is assuredly frustrating to find that a jurisdictional impediment prevents us from reaching the important merits issues that were the reason for our agreeing to hear this case. But we cannot ignore such impediments for purposes of our appellate review without simultaneously affecting the principles that govern district courts in their assertion or retention of original jurisdiction. We thus do substantial harm to a governmental structure designed to restrict the courts to matters that actually affect the litigants before them.

104 S. Ct. 3371

Irving Indep. Sch. Dist. v. Tatro

IRVING INDEPENDENT SCHOOL DISTRICT v. TATRO, et ux.,

individually and as next friends of TATRO,

a minor,

No. 83-558

U.S. Supreme Court

JULY 5 1984

* Attorneys' Fees/Generally, Relationship Between IDEA and Section 504

* Attorneys' Fees/Generally, Availability Under Section 504

Summary

Respondents' 8-year-old daughter was born with a defect known as spina bifida. As a result she suffers from orthopedic and speech impairments and a neurogenic bladder, which prevents her from emptying her bladder voluntarily. Consequently, she must be catheterized every three or four hours to avoid injury to her kidneys. To accomplish this, a procedure known as clean intermittent catheterization (CIC) was prescribed. This is a simple procedure that can be performed in a few minutes by a layperson with less than an hour's training. Since petitioner School District received federal funding under the Education of the Handicapped Act it was required to provide the child with "a free appropriate public education," which is defined in the Act to include "related services," which are defined in turn to include "supportive services (including ... medical ... services except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from a special education." Pursuant to the Act, petitioner developed an individualized education program for the child, but the program made no provision for school personnel to administer CIC. After unsuccessfully pursuing administrative remedies to secure CIC services for the child during school hours, respondents brought an action against petitioner and others in Federal District Court, seeking injunctive relief, damages, and attorney's fees. Respondents invoked the Education of the Handicapped Act, arguing that CIC is one of the included "related services" under the statutory definition, and also invoked 504 of the Rehabilitation Act of 1973, which forbids a person, by reason of a handicap, to be "excluded from the participation in, be denied the benefits of, or

be subjected to discrimination under" any program receiving federal aid. After its initial denial of relief was reversed by the Court of Appeals, the District Court, on remand, held that CIC was a "related service" under the Education of the Handicapped Act, ordered that the child's education program be modified to include provision of CIC during school hours, and awarded compensatory damages against petitioner. The court further held that respondents had proved a violation of 504 of the Rehabilitation Act, and awarded attorney's fees to respondents under 505 of that Act. The Court of Appeals affirmed.

Held:

1. CIC is a "related service" under the Education of the Handicapped Act. Pp. 5-11.

(a) CIC services qualify as a "supportive servic[e] . . . required to assist a handicapped child to benefit from special education," within the meaning of the Act. Without CIC services available during the school day, respondents' child cannot attend school and thereby "benefit from special education." Such services are no less related to the effort to educate than are services that enable a child to reach, enter, or exit a school. Pp. 6-7.

(b) The provision of CIC is not subject to exclusion as a "medical service." The Department of Education regulations, which are entitled to deference, define "related services" for handicapped children to include "school health services," which are defined in turn as "services provided by a qualified school nurse or other qualified person," and define "medical services" as "services provided by a licensed physician." This definition of "medical services" is a reasonable interpretation of congressional intent to exclude physician's services as such and to impose an obligation to provide school nursing services. Pp. 7-11.

2. Section 504 of the Rehabilitation Act is inapplicable when relief is available under the Education of the Handicapped Act to remedy a denial of educational services, Smith v. Robinson, post, p. ---, and therefore respondents are not entitled to any relief under 504, including recovery of attorney's fees. Pp. 11-12.

703 F. 2d 823, affirmed in part and reversed in part.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined STEVENS, J., filed an opinion concurring in part and dissenting in part.

Burger, C.J., and Brennan, White, Marshall, Blackmun, Powell,

Rehnquist, Stevens, and O'Connor, JJ.

BURGER, Chief Justice

Certiorari to the United States Court of Appeals for the Fifth

Circuit CHIEF JUSTICE BURGER delivered the opinion of the Court. We granted certiorari to determine whether the Education of the Handicapped Act or the Rehabilitation Act of 1973 requires a school district to provide a handicapped child with clean intermittent catherterization during school hours.

I

Amber Tatro is an 8-year-old girl born with a defect known as spina bifida. As a result, she suffers from orthopedic and speech impairments and a neurogenic bladder, which prevents her from emptying her bladder voluntarily. Consequently, she she must be catheterized every three or four hours to avoid injury to her kidneys. In accordance with accepted medical practice, clean intermittent catheterization (CIC), a procedure involving the insertion of a catheter into the urethra to drain the bladder, has been prescribed. The procedure is a simple on that may be performed in a few minutes by a layperson with less than an hour's training. Amber's parents, babysitter, and teenage brother are all qualified to administer CIC, and Amber soon will be able to perform this procedure herself.

In 1979 petitioner Irving Independent School District agreed to provide special education for Amber, who was then three and one-half years old. In consultation with her parents, who are respondents here, petitioner developed an individualized education program for Amber under the requirements of the Education of the Handicapped Act, 84 Stat. 175, as amended significantly by the Education for All Handicapped Children Act of 1975, 89 Stat. 773, 20 U.S.C. 1401(19), 1414(a)(5). The individualized education program provided that Amber would attend early childhood development classes and receive special services such as physical and occupational therapy. That program, however, made no provision for school personnel to administer CIC.

Respondents unsuccessfully pursued administrative remedies to secure CIC services for Amber during school hours.1 In October 1979 respondents brought the present action in District Court against petitioner, the State Board of Education, and others. See 1415(e)(2). They sought an injunction ordering petitioner to provide Amber with CIC and sought damages and attorney's fees. First, respondents invoked the Education of the Handicapped Act.

Because Texas received funding under that statute, petitioner was required to provide Amber with a "free appropriate public education," 1412(1), 1414(a)(1)(C)(ii), which is defined to include "related services," 1404(18). Respondents argued that CIC is one such "related service."2 Second, respondents invoked 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U.S.C. 794, which forbids an individual, by reason of a handicap, to be "excluded from participation in, be denied the benefits of, or be subject to discrimination under" any program receiving federal aid.

The District Court denied respondents' request for a preliminary injunction. Tatro v. Texas, 481 F. Supp. 1224 (ND Tex. 1979). That court concluded that CIC was not a "related service" under the Education of the Handicapped Act because it did not serve a need arising from the effort to educate. It also held that 504 of the Rehabilitation Act did not require "the setting up of governmental health care for people seeking to participate" in federally funded programs. Id., at 1229.

The Court of Appeals reversed. Tatro v. Texas, 625 F 2d 557 (CA5 1980) (Tatro I). First, it held that CIC was a "related service" under the Education of the Handicapped Act, 20 U.S.C. 1401(17), because without the procedure Amber could not attend classes and benefit from special education. Second, it held that petitioner's refusal to provide CIC effectively excluded her from a federally funded educational program in violation of 504 of the Rehabilitation Act. The Court of Appeals remanded for the District to develop a factual record and apply these legal principles.

On remand petitioner stressed the Education of the Handicapped Act's explicit provision that "medical services" could qualify as "related services" only when they served the purpose of diagnosis or evaluation. See n. 2, supra. The District Court held that under Texas law a nurse or other qualified person may administer CIC without engaging in the unauthorized practice of medicine, provided that a doctor prescribes and supervises the procedure. The District Court then held that, because a doctor was not needed to administer CIC, provision of the procedure was not a "medical service" for purposes of the Education of the Handicapped Act. Finding CIC to be a "related service" under that Act, the District Court ordered petitioner and the State Board of Education to modify Amber's individualized education program to include provision of CIC during school hours. It also awarded compensatory damages against petitioner.3 Tatro v. Texas, 516 F. Supp. 968 (ND Tex. 1981).

On the authority of Tatro I, the District Court then held that respondents had proved a violation of 504 of the Rehabilitation Act. Although the District Court did not rely on this holding to authorize any greater injunctive or compensatory relief, it did invoke the holding to award attorney's fees against petitioner and the State Board of Education.4 516 F. Supp., at 968; App. to Pet. for Cert. 55a-63a. The Rehabilitation Act, unlike the Education of the Handicapped Act, authorizes prevailing parties to recover attorney's fees. See 29 U.S.C. 79a.

The Court of Appeals affirmed. Tatro v. Texas, 703 F. 2d 823 (CA5 1983) (Tatro II). That court accepted the District Court's conclusion that state law permitted qualified persons to administer CIC without the physical presence of a doctor, and it affirmed the award of relief under the Education of the Handicapped Act. In affirming the award of attorney's fees based on a finding of liability under the Rehabilitation Act, the Court of Appeals held that no change of circumstances since Tatro I justified a different result.

We granted certiorari, 464 U.S. --- (1983), and we affirm in part and reverse in part.

II

This case poses two separate issues. The first is whether the Education of the Handicapped Act requires petitioner to provide CIC services to Amber. The second is whether 504 of the rehabilitation Act creates such an obligation. We first turn to the claim presented under the Education of the Handicapped Act. States receiving funds under the Act are obliged to satisfy certain conditions. A primary condition is that the state implement a policy "that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. 1412(1). Each educational agency applying to a state for funding must provide assurances in turn that its program aims to provide "a free appropriate public education to all handicapped children." 1414(a)(1)(C)(ii).

A "free appropriate public education" is explicitly defined as "special education and related services." 1401(18).5 The term "special education" means

"specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." 1401(16).

"Related services" are defined as

"transportation, and such developmental, corrective, and other SUPPORTIVE SERVICES (INCLUDING speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and MEDICAL and counseling SERVICES, EXCEPT THAT SUCH MEDICAL SERVICES SHALL BE FOR DIAGNOSTIC AND EVALUATION PURPOSES ONLY) AS MAY BE REQUIRED TO ASSIST A HANDICAPPED CHILD TO A BENEFIT FROM SPECIAL EDUCATION. and includes the early identification and assessment of handicapping conditions in children." 1401(17) (emphasis added where capitalized).

The issue in this case is whether CIC is a "related service" that petitioner is obliged to provide to Amber. We must answer two questions: first, whether CIC is a "supportive servic[e]. . . required to assist a handicapped child a benefit from special education"; and second, whether CIC is excluded from this definition as a "medical servic[e]" serving purposes other than diagnosis or evaluation.

A

The Court of Appeals was clearly correct in holding that CIC is a "supportive servic[e] . . . required to assist a handicapped child to benefit from special education."[6] It is clear on this record that, without having CIC services available during the school day, Amber cannot attend school and thereby "benefit from special education." CIC services therefore fall squarely within the definition of a supportive service."[7]

As we have stated before, "Congress sought primarily to make public education available to handicapped children" and "to make such access meaningful." Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 192 (1982). A service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned. The Act makes specific provision for services, like transportation, for example, that do no more than enable a child to be physically present in class, see 20 U.S.C. 1401(7); and the Act specifically authorizes grants for schools to alter buildings and equipment to make them accessible to the handicapped, 1406; see S. Rep. No. 94-168, p. 38 (1975); 121 Cong. Rec. 19483-19484 (1975) (remarks on Sen. Stafford). Services like CIC that permit a child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school.

We hold that CIC services in this case qualify as a "supportive servic[e] . . . required to assist a handicapped child to benefit from special education."[8]

B

We also agree with the Court of Appeals that provision of CIC is not a "medical servic[e]," which a school is required to provide only for purpose of diagnosis or evaluation. See 20 U.S.C. 1401(7). We begin with the regulations of the Department of Education, which are entitled to deference.[9] See, e.g., Blum v. Bacon, 457 U.S. 132, 141 (1982). The regulations define "related services" for handicapped children to include "school health services," 34 CFR 300 13(a) (1983), which are defined in turn as "services provided by a qualified school nurse or other qualified person," 300.13(b)(10). "Medical services" are defined as "services provided by a licensed pyhsican." 300.13(b)(4).[10] Thus, the Secretary has determined that the services of a school nurse otherwise qualifying as a "related service" are not subject to exclusion as a "medical service," but that the services of a physician are excludable as such.

This definition of "medical services" is a reasonable interpretation of congressional intent. Although Congress devoted little discussion to the "medical services" exculsion, the Secretary could reasonably have concluded that it was designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence.11 From this understanding of congressional purpose, the Secretary could reasonably have concluded that Congress intented to impose the obligation to provide school nursing services.

Congress plainly required required schools to hire various specially trained personnel to help handicapped children, such as "trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel." S. Rep. No. 94-168, supra, at 33. School nurses have long been a part of the educational system, and the Secretary could therefore reasonably conclude that school nursing services are not the sort of burden that Congress intended to exclude as a "medical service." By limiting the "medical services" exclusion to the services of a physician or hospital, both far more expensive, the Secretary has given a permissible construction to the provision.

Petitioner's contrary interpretation of the "medical services" exclusion is unconvincing. In petitioner's view, CIC is a "medical service," even though it may be provided by a nurse or trained layperson; that conclusion rests on its reading of Texas law that confines CIC to uses in accordance with a physician's prescription and under a physician's ultimate supervision. Aside from conflicting with the Secretary's reasonable interpretation of congressional intent, however, such a rule would be anomalous. Nurses in petitioner's school district are authorized to dispense oral medications and administer emergency injections in accordance with a physician's prescription. This kind of service for nonhandicapped children is difficult to distinguish from the provision of CIC to the handicapped.12 It would be strange indeed if Congress, in attempting to extend special services to handicapped children, were unwilling to guarantee them services of a kind that are routinely provided to the nonhandicapped.

To keep in perspective the obligation to provide services that relate to both the health and educational needs of handicapped students, we note several limitations that should minimize the burden petitioner fears.

First, to be entitled to related services, a child must be handicapped so as to require special education. See 20 U.S.C. 1401(1); 34 CFR 300.5 (1983). In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create an obligation under the Act. See 34 CFR 300.14, Comment (1) (1983).

Second, only those services necessary to aid a handicapped child to benefit from special education must be provided, regardless how easily a school nurse or layperson could furnish them. For example, if a particular medication or treatment may appropriately be administered to a handicapped child other than during the school day, as school is not required to provide nursing services to administer it.

Third, the regulations state that school nursing services must be provided only if they can be performed by a nurse or other qualified person, not if they must be performed by a physician. See 34 CFR 300.13(a), (b)(4) (b)(10) (1983). It bears mentioning that here not even the services of a nurse are required; as is conceded, a layperson with minimal training is qualified to provide CIC. See also, e.g., Department of Education of Hawaii v. Katherine D., 727 F. 2d 809 (CA9 1983).

Finally, we note that respondents are not asking petitioner to provide equipment that Amber needs for CIC. Tr. of Oral Arg. 18-19. They seek only the services of a qualified person at the school.

We conclude that provision of CIC to Amber is not subject to exclusion as a "medical service," and we affirm the Court of Appeals' holding that CIC is a "related service" under the Education of the Handicapped Act.[13]

III

Respondents sought relief not only under the Education of the Handicapped Act but under 504 of the Rehabilitation Act as well. After finding petitioner liable to provide CIC under the former, the District Court proceeded to hold that petitioner was similarly liable under 504 and that respondents were therefore entitled to attorney's fees under 505 of the Rehabilitation Act, 29 U.S.C. 794a. We hold today, in Smith v. Robinson, --- U.S. ---(1984), that 504 is inapplicable when relief is available under the Education of the Handicapped Act to remedy a denial of educational services. Respondents are therefore not entitled to relief under 504, and we reverse the Court of Appeals' holding the respondents are entitled to recover attorney's fees. In all other respects, the judgment of the Court of Appeals is affirmed.

It is so ordered.

[1] The Education of the Handicapped Act's procedures for administrative hearings are set out in 20 U.S.C. 1415. In this case a hearing officer ruled that the Education of the Handicapped Act did require the school to provide CIC. and the Texas Commissioner of Education adopted the hearing officer's decision.

The State Board of Education reversed, holding that the Act did not require petitioner to provide CIC.

2 As discussed more fully later, the Education of the Handicapped Act defines "related services" to include "supportive services (including . . . . medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education." 2o U.S.C. 1401(17).

3 The District Court dismissed the claims against all defendants other than petitioner and the State Board, though it retained the members of the State Board "in their official capacities for the purpose of injunctive relief." 516 F. Supp., at 972-974.

4 The District Court held that 505 of the Rehabilitation Act, 29 U.S.C. 794a, which authorizes attorney's fees as a part of a prevailing party's costs, abrogated the State Board's immunity under the Eleventh Amendment. See App. to Pet. for Cert. 56a-60a. The State Board did not petition for certiorari, and the Eleventh Amendment issue is not before us.

5 Specially, the "special education and related services" must "(A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) [be] provided in conformity with the individualized education program required under section 1414(a)(5) of this title." 1401(18).

6 Petitioner claims that courts deciding cases arising under the Education of the Handicapped Act are limited to inquiring whether a school district had followed the requirements of the state plan and has followed the Act's procedural requirements. However, we held in Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206, n. 27 (1982), that a court required "not only to satisfy itself that the State had adopted the state plan, policies, and assurances required by the Act, but also to determine that the State has created an [individualized education plan] for the child in question which conforms with the requirements of 1401(19) [defining such plans]." Judicial review is equally appropriate in this case, which presents the legal question of a school's substantive obligation under the "related services" requirement of 1401(17).

7 The Department of Education has agreed with this reasoning in an interpretive ruling that specifically found CIC to be a "related service." 46 Fed. Reg. 4912 (1981). Accord Tokarcik v. Forest Hills School District, 665 F. 2d 443 (CA3 1981), cert. denied sub nom. Scanlon v. Tokarcik, 458 U.S. 1121 (1982). The Secretary twice postponed temporarily the effective date of this interpretive ruling, see 46 Fed. Reg. 12495 (1981); id. at 18975,

and later postponed it indefinitely, id. at 25614. But the Department presently does view CIC services as an allowable cost under Part B of the Act. Ibid.

8 The obligation to provide special education and related services is expressly phrased as a "conditio[n]" for a state to recieve fund under the Act. See 20 U.S.C. 1412; see also S. Rep. No. 94-168, p. 16 (1975). This refutes petitioner's contention that the Act did not "impos[e] an obligation on the States to spend state money to fund certain rights as a condition of receiving federal moneys" but "spoke merely in precatory terms," Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 18 (1981).

9 The Secretary of Education is empowered to issue such regulations as may be necessary to carry out the provisions of the Act. 20 U.S.C. 1417(b). This function was initially vested in the Commissioner of Education of the Department of Health, Education, and Welfare, who promulgated the regulations in question. This function was transferred to the Secretary of Education when Congress created that position, see Department of Education Organization Act, 301(a)(1), (2)(H), 93 Stat. 677. 20 U.S.C. 3441(a)(1), (2)(H).

10 The regulations actually define only those "medical services" that are owed to handicapped children: "services provided by a licensed physician to determine a child's medically related handicapped condition which results in the child's need for special education and related services." 34 CFR 300.13(b)(4) (1983). Presumably this means that "medical services" not owed under the statute are those "services by a licensed physician" that serve other purposes.

11 Children with serious medical needs are still entitled to an education. For example, the Act specifically includes instruction in hospitals and at home within the definition of "special education." See 20 U.S.c. 1401(16).

12 Petitioner attempts to distinguish the administration of prescription drugs from the administration of CIC on the ground that Texas law expressly limits the liability of school personnel performing the former, see Tex. Educ. Code Ann. 21.914(c) (Supp. 1984), but not the latter. This distinction, however, bears no relation to whether CIC is a "related service." The introduction of handicapped children into a school creates numerous new possibilities for injury and liability. Many of these risks are safe procedure even when performed by a 9-year-old girl. Congress assumed that states receiving the generous grants under the Act were up to the job of managing these new risks. Whether petitioner decides to purchase more liability insurance or to persuade the

state to extend the limitation on liability, the risks posed by CIC should not prove to be large burden.

13 We need not address respondents' claim that CIC, in addition to being a "related service," is a "supplementary ai[d] and servic[e]" that petitioner must provide to enable Amber to attend classes with nonhandicapped students under the Acts's "mainstreaming" directive. See 20 U.S.C. 1412(5)(b). Respondents have not sought an order prohibiting petitioner from educating Amber with handicapped children alone. Indeed, any request for such an order might not present a live controversy. Amber's present individualized education program provides for regular public school classes with nonhandicapped children. And petitioner has admitted that it would be far more costly to pay for Amber's instruction and CIC services at a private school, or to arrange for home tutoring, than to provide CIC at the regular public school placement provided in her current individualized education program. Tr. of Oral Arg. 12.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I join all but Part III of the Court's opinion. For the reasons stated in my dissenting opinion in Smith v. Robinson, ante, at ---, I would affirm the award of attorney's fees to the respondents.

JUSTICE STEVENS, concurring in part and dissenting in part.

The petition for certiorari did not challenge the award of attorney's fees. It contested only the award of relief on the merits of respondents. Inasmuch as the judgment on the merits is supported by the Court's interpretation of the Education of the Handicapped Act, there is no need to express any opinion concerning the Rehabilitation Act of 1973. * Accordingly, while I join Parts I and II of the Court's opinion, I do not join Part III.

*The "Statement of the Questions Presented" in the petition for certiorari reads as follows:

"I. Whether `medical treatment' such as clean intermittent catheterization is a `related service' required under the Education for All Handicapped Children Act and, therefore, required to be provided to the minor respondent.

"2. Is a public school required to provide an perform the medical treatment prescribed by the physician of a handicapped child by the Education of All Handicapped Children Act or the Rehabilitation Act of 1973?

"3. Whether the Fifth Circuit Court of Appeals misconstrued the opinions of this Court in Southeastern Community College, Pennhurst State School & Hospital v. Halderman, and State Board of Education v. Rowley." Pet. for Cert. i.

Because the Court does not hold that the Court of Appeals answered any of these questions incorrectly, it is not justified in reversing in part the judgment of that court.

17 EHLR 170

921 F.2d 1022

Johnson v. Independent Sch. Dist. No. 4

Natalie JOHNSON, a minor who sues by and through Fred and Jennifer JOHNSON, her father and mother, as next friends,
Plaintiff-Appellant
v.
INDEPENDENT SCHOOL DISTRICT NO. 4 OF BIXBY, TULSA COUNTY, OKLAHOMA; OKLAHOMA STATE DEPARTMENT OF EDUCATION; CHILDREN'S DEVELOPMENTAL CENTER,

Defendants-Appellees

No. 89-5111

U.S. Court of Appeals, Tenth Circuit

DECEMBER 11 1990

* Extended School Day/Year, Eligibility

* Multiple Disabilities, In General

Summary

The parents of an eight-year-old, severely and multiply disabled child sought a structured summer educational program for their daughter. The district rejected the parents' request, and its decision was subsequently affirmed in administrative proceedings and federal district court. The parents appealed.

HELD: for the parents, in part.

Finding that both the administrative proceedings and the district court relied on insufficient information to determine whether the child needed a summer program, the court of appeals reversed the district court's grant of summary judgment to the defendants. Specifically, the administrative and judicial record only contained information on the child's past regression and recoupment problems. However, other factors must be considered, such as the probability of future regression, the degree of the child's impairment, the parents' ability to provide education in the home, the child's rate of progress, the child's needs for interaction with nondisabled peers and vocational training, and whether the requested services are an integral part of a program for children with similar disabling conditions. Moreover, the court of appeals found the state law in direct contradiction to the EHA, to the extent that it does not require consideration of these multiple factors. Thus, the case was remanded for further proceedings consistent with this decision. On a procedural issue,

BEST COPY AVAILABLE

however, the court of appeals ruled that the special education cooperative was not a necessary party to this action, because state law did not designate intermediate units as proper parties to receive requests for due process hearings.

Counsel for Plaintiff-Appellant: Lowell Thomas Price, Jr., of Protection & Advocacy Agency, Tulsa, OK.

Counsel for Defendants-Appellees, Bixby Independent School District No. 4 and Children's Developmental Center: Andrea K. Allbritton, of Rosenstein, Fist & Ringold, Tulsa, OK (John G. Moyer, Jr. with her on briefs).

Counsel for Defendant-Appellee, Oklahoma State Department of Education: Kay Mildren, with her on the briefs, Oklahoma State Department of Education, Oklahoma City, OK.

Before Holloway, Moore, and Brorby, Circuit Judges.
PER CURIAM
Appeal from the United States District Court for the Northern District of Oklahoma.
This case involves an action brought under the Education of All Handicapped Children's Act, 20 U.S.C. §§ 1400-1485 (1989), as implemented by 34 C.F.R. §§ 300.1-300.754 (1989) (collectively referred to as "the Act"). Natalie Johnson is a severely and multiply handicapped child who was eight years old at the time her local school district rejected her parents' request for a structured summer educational program. Natalie's parents invoked the due process provisions of the Act, and the schools' decision was administratively and judicially affirmed. There are two issues on appeal: (1) What information should be considered as a basis for entitlement under the Act to a free extended year school program in addition to the traditional September through May nine-month school program? (2) In Oklahoma, is the cooperative special education service provider a necessary party to the due process procedure mandated by the Act? As to the first issue, we reverse the district court's grant of summary judgment in favor of the schools because insufficient information was utilized in both the administrative proceedings and the district court to satisfy the Act's procedural requirement for individualized review of Natalie's program plan. As to the second issue, we conclude that the special education cooperative unit is not a necessary party to this action.

I.

It is undisputed that Natalie has profound autistic defenses with at least moderate mental retardation and seizures. She has received educational services since the age of eighteen months from the Children's Development Center (CDC), a cooperative special education program serving severely and multiply handicapped children from several local county school districts, administered by the Superintendent of the Tulsa County Public Schools.1 Natalie and her family are legal residents within the Independent School District No. 4 of Bixby, Tulsa County, Oklahoma (the Bixby school district), which is, in turn, a member of the CDC cooperative program. CDC operates for nine months of the year, September through May. The Bixby school district does not provide a structured summer program for its severely and multiply handicapped children.

During the nine months of the regular school year, Natalie attended the CDC. For four years, 1982-1986, she attended a recreational day camp for handicapped children run by the Tulsa Association for the Retarded (TAR) during six weeks in the summer. The parties dispute whether this day camp experience had a positive educational effect on Natalie or whether it was tantamount to no structured educational program.

In January 1987, at the regular annual meeting held to plan Natalie's educational program, the Johnsons requested that Natalie be provided with a structured summer educational program. This request was denied after a separate meeting was held in April 1987 to discuss the issue. The Johnsons then invoked the due process procedures defined by the Act, beginning with a hearing before an administrative hearing officer appointed by the Oklahoma State Department of Education.

At the hearing, the Johnsons presented evidence in the form of testimony from Natalie's mother and from the social worker for Natalie's family, R. Vol. II, tr. at 9-33, 58-85, as well as written opinions from her pediatrician, her neurologist, and a psychologist who evaluated Natalie. R. Vol. II. All agreed that she needed to continue her experience in a structured educational setting during the summer months to prevent regression.

The school district presented testimony from Natalie's classroom teacher and her speech therapist for the 1985-86 and 1986-87 school years. Both teachers testified that, in fact, Natalie had not regressed during the summer of 1986 even though she had not participated in an extended school year program during that period. R. Vol. II, tr. at 89-90, 99-101.

The hearing officer found that Natalie's educational record did not provide objective documentation of improvement or lack of regression, despite her teachers' optimistic testimony. R. Vol. II, Hearing decision, findings of fact, ¶¶ 7, 8. The hearing officer concluded that an extended school year program was not warranted for Natalie. The hearing officer's decision was based, first, on the legal premise that predictions of future regression are insufficient to compel the schools to provide an extended school year to a handicapped child, and, second, on the factual finding that Natalie's parents failed to demonstrate that Natalie had in fact regressed during the summer of 1986.

Natalie's parents appealed the decision, and the appeals officer affirmed the hearing officer's decision, stating that "[a]ll parents are encouraged to supplement their children's required education in an effort to maximize the individual child's potential; but, this additional effort is not the School's responsibility." R. Vol. II, Appeal Review Decision at 3.

Natalie's parents then filed this action against the Bixby school district, the CDC and the Oklahoma State Department of Education (collectively referred to as "the schools") in the district court for the Northern District of Oklahoma, seeking judicial review of the decision. No additional evidence was offered by either party and the matter was referred to a magistrate following cross motions for summary judgment. The magistrate issued a report and recommendation stating that the preponderance of the evidence indicated that Natalie could be predicted to regress during the summer months without a structured summer program, and concluding that, pursuant to the Act, the schools must provide Natalie with a structured summer educational program as a continuation of her program during the regular school year. R. Vol. I, tab 27.

However, the district court, basing its decision on the same regression evaluation standard used by the administrative hearing officer, found the evidence that Natalie had not regressed during the previous summer, presented by two teachers who had worked with Natalie on a daily basis for many months, to be more compelling than the predictions of outside experts, who had less continuous contact with the child, that such a summer program would prevent regression in the future. The district court therefore granted the schools' motion for summary judgment, holding that, as a matter of law under the Act and the Oklahoma statute, the Bixby school district was not required to provide an extended school year program to Natalie. Johnson v. Independent School District No. 4, No. 88-C-340-C (N.D. Okla. June 5, 1989). Natalies' parents appealed.

II.

This court has jurisdiction on appeal pursuant to § 1415(e) of the Act, and 28 U.S.C. § 1291 (1989). See also Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 186 n.9 (1982) (the court has jurisdiction over an issue which evades review yet is capable of repetition).

The final district court order in this case was grant of the schools' motion for summary judgment.

> We review the summary judgment orders de novo, applying the same legal standard used by the district court under Rule 56(c) of the Federal Rules of Civil Procedure. Summary judgment should be

> granted only if "there is no genuine issue as to any material fact and. . .the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When applying this standard, we are to examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. However, the nonmoving party may not rest on his pleadings; the party must set forth specific facts showing that there is a genuine issue for trial.

Abercrombie v. City of Catoosa, 896 F.2d 1228, 1230 (10th Cir. 1990) (citations omitted).

In Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176 (1982), the Supreme Court established a twofold inquiry for district courts to use in determining whether the Act's requirements have been met: (1) Has the State complied with the procedures set forth in the Act? (2) Is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? Id. at 206-07.

The legal standard to be used by the district court in considering each of these issues is set forth in the Act: "In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2); see Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 173 (3d Cir. 1988), cert. denied, 109 S. Ct. 838 (1989).2 This case was submitted to the district court on the administrative record, including a transcript of the administrative hearing. Thus, our review includes de novo factual analysis based on that administrative record, as well as de novo legal analysis of the issues presented.

The parties should note that the burden of proof in these matters rests with the party attacking the child's individual education plan. In Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153 (5th Cir. 1986), the Fifth Circuit reiterated that the Act

> "placed primary responsibility for formulating handicapped children's education in the hands of state and local school agencies in cooperation with each child's parents." In deference to this statutory scheme and the reliance it places on the expertise of local education authorities, . . . the Act creates a "presumption in favor of the education placement established by [a child's individualized education plan]," and "the party attacking its terms should bear the

> burden of showing why the educational setting established by the [individualized education plan] is not appropriate."

Id. at 1158 (quoting Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984)) (footnotes omitted).

III.

States which elect to receive federal funds under the Act must provide all handicapped children with the right to a "free appropriate public education." 20 U.S.C. § 1412(1). Under the Act, each child's substantive educational program must be defined by an annual individual educational plan (IEP) developed by the local school district in consultation with the child's parents. 34 C.F.R. §§ 300.340-.345. The IEP must include the specific goals, teaching methods, and evaluation procedures appropriate to that child's educational needs. Id. § 300.346. Each child's IEP must be revised at an annual meeting of the teachers and therapists who work with the child, his or her parents, and local school district special education administrators (IEP meeting). Id. §§ 300.341-.345. If the child's special education placement or program as defined by the IEP is disputed by the child's parents, the Act sets forth a procedure by which the IEP is to be reviewed by an impartial hearing officer through the administration of the state education agency. 20 U.S.C. §§ 1415(a),(b),(d); 34 C.F.R. §§ 300.500-.508. The decision of the hearing officer may be appealed to an appeals hearing officer, also appointed by the state educational agency. 20 U.S.C. § 1415(c); 34 C.F.R. §§ 300.509-.510. That decision may be reviewed in an action brought in state court or in the local federal district court. 34 U.S.C. § 1415(e); 34 C.F.R. § 300.511.

We are bound by the Act, which rests on the cornerstone of granting handicapped children entitlement to a "free appropriate public education," 20 U.S.C. § 1412(1), based on an individually designed education plan revised at least annually. Id. at § 1414(a)(5); Rowley, 458 U.S. at 203. The individualization requirement is of paramount importance in the Act. 20 U.S.C. §§ 1401(a)(19), 1412(2)(B); Rowley, 458 U.S. at 188-89, 198, 202; Polk, 853 F.2d at 172; Battle v. Pennsylvania, 629 F.2d 269, 280 (3d Cir.), on remand, 513 F. Supp. 425 (E.D. Pa. 1980), cert. denied sub nom. Scanlon v. Battle, 452 U.S. 968 (1981). While it would be easier for those involved in administrative review under the Act to have one and only one criterion for evaluating the appropriateness of a handicapped child's IEP, the handicapping impediments which force individualization of the child's education program in the first place also mandate an individualized approach to review of the child's IEP.

The amount of regression suffered by a child during the summer months, considered together with the amount of time required to recoup those lost skills when school resumes in the fall, is an important consideration in assessing an individual child's need for continuation of his or her structured educational program in the summer months. In Alamo Heights, the Fifth Circuit explained this "regression-recoupment" analysis, which plays an integral part in the case before us today:

> As we stated in Crawford v. Pittman [708 F.2d 1028 (5th Cir. 1983)], "The basic substantive standard under the Act, then, is that each IEP must be formulated to provide some educational benefit to the child," in accordance with "the unique needs" of that child. The some-educational-benefit standard does not mean that the requirements of the Act are satisfied so long as a handicapped child's progress, absent summer services, is not brought "to a virtual standstill." Rather, if a child will experience severe or substantial regression during the summer months in the absence of a summer program, the handicapped child may be entitled to year-round services. The issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months.

790 F.2d at 1158 (citations omitted).

However, the regression-recoupment analysis is not the only measure used to determine the necessity of structured summer program. In addition to degree of regression and the time necessary for recoupment, courts have considered many factors important in their discussions of what constitutes an "appropriate" educational program under the Act. These include the degree of impairment and the ability of the child's parents to provide the educational structure at home, Battle, 629 F.2d at 280; the child's rate of progress, his or her behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with non-handicapped children, the areas of the child's curriculum which need continuous attention, and the child's vocational needs, Yaris v. Special School Dist., 558 F. Supp. 545, 551 (E.D. Mo. 1983), aff'd, 728 F.2d 1055 (8th Cir. 1984); and whether the requested service is "extraordinary" to the child's condition, as opposed to an integral part of a program for those with the child's condition. Polk, 853 F.2d at 182. In fact, the Third Circuit recently explicitly rejected using solely a regression analysis to determine the necessity of a summer program under the Act:

> [A] serious problem. . .lies in defendants' implicit suggestion

> that a child must first show regression before his parents may challenge the appropriateness of his education. . . .[W]e do not believe that Congress intended that courts present parents with the Hobson's choice of allowing regression (hence proving their claim) or providing on their own what their child needs to make meaningful progress.

Polk, 853 F.2d at 184.

In Rowley, the Supreme Court explicitly held that administrative and court review may not limit analysis of the appropriateness of the IEP to any single criterion. "We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." 458 U.S. at 202; see also Yaris, 558 F. Supp. at 558. This restraint is as applicable to a specific educational program element, such as whether a child should be provided a structured summer educational experience, as it is to a generalized issue such as the "adequacy of educational benefits conferred upon all children covered by the Act." Rowley, 458 U.S. at 202; see also Crawford, 708 F.2d at 1034 n. 28 (declining to state whether the "regression-recoupment syndrome" should be used as a test to narrow the class of children to whom a summer program must be offered).

We prefer to adopt the Fifth Circuit's broad premise, as articulated in Alamo Heights:

> The issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months. This is, of course, a general standard, but it must be applied to the individual by [those drafting and approving the IEP] in the same way that juries apply other general legal standards such as negligence and reasonableness.

790 F.2d at 1158.[3] The analysis of whether the child's level of achievement would be jeopardized by a summer break in his or her structured educational programming should proceed by applying not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child's parents as well as circumstantial considerations of the child's individual situation at home and in his or her neighborhood and community.[4]

In so holding, we are mindful of the Supreme Court's caution in Rowley that the "appropriate" education required by the Act is not one which is guaranteed to maximize the child's potential. 458 U.S. at 197 n.21; accord Polk, 853 F.2d at 178-179; Muth v. Central Bucks School Dist., 839 F.2d 113, 119 (3d Cir.), cert.

denied, 109 S.Ct. 103 (1988)(as to local school district defendant and grounds pertinent hereto), and rev'd, 109 S.Ct. 2397 (1989)(only as to state as defendant on 11th Amendment immunity grounds).[5] The Act insures, first, that some services are provided to children who previously had received no services at all. 20 U.S.C. § 1412(3); see, e.g., Rowley, 458 U.S. at 201 (each child must be provided with a "basic floor of opportunity"); Polk, 853 F.2d at 179. Second, it insures that those services which are provided are individualized. 20 U.S.C. § 1412(2)(B). And third, it gives parents the right and obligation to act as the enforcement arm of the entitlement through the procedural safeguards outlined and mandated by the Act. 20 U.S.C. § 1412(5); Rowley, 458 U.S. at 205-06; Hall v. Vance County Bd. of Educ., 774 F.2d 629, 634 (4th Cir. 1985). Congress was mindful of the financial burdens which such expanded services imposed,[6] and was not utopian in its goals.

The State of Oklahoma is a recipient of federal assistance though the Act, and its legislature has enacted a correlative enabling statute, Okla. Stat. tit. 70, § 13-101 (1989 & Supp. 1990)(the Oklahoma statute). The Oklahoma statute includes the provision that, if the child's IEP recommends continuing educational services during the summer, the local school district will be funded to provide a maximum of forty days educational programming during the summer to prevent loss of the educational gains achieved during the nine-month school year.[7]

If state legislation implementing the Act grants a broader entitlement than that found in the federal statute, the state statute defines the parameters of the program which must be extended to children living in that state. See Board of Educ. v. Diamond, 808 F.2d 987, 992 (3rd Cir. 1986); David D. v. Dartmouth School Comm., 775 F.2d 411, 417, 420 (1st Cir. 1985)(the Act incorporates state substantive law implementing the Act), cert. denied sub nom. Massachusetts Dept. of Educ. v. David D., 475 U.S. 1140 (1986).

However, the Oklahoma statute is not broader than its federal counterpart in its provision for funding for forty days of summer programming under an IEP. The Third, Fifth, Eighth and Eleventh Circuits have all held that under the Act itself, states must provide a continuous educational experience through the summer under the child's IEP if that is the "appropriate" educational experience for the handicapped child's situation. Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1576 (11th Cir. 1983), modified on other grounds, 740 F.2d 902 (1984), cert. denied, 469 U.S. 1228 (1985); Crawford, 708 F.2d at 1034; Yaris, 558 F. Supp. at 559; Battle, 629 F.2d at 281. Thus, the federal statute's mandate of a "free appropriate public education," as judicially interpreted, includes the provision for a summer program if appropriate under a child's IEP. It follows that the Oklahoma statute, while assuring local school districts that state funding will cover a forty-day structured educational program during the summer for a child's individualized program, does not expand the federal statute.

To the extent that the Oklahoma statute has been interpreted to require the party attacking the child's proposed IEP to prove that the child has already experienced significant regression with ineffective recoupment of educational or basic life skills, or could be predicted to experience such regression during summer months, in isolation from any other elements which may be important to an individualized assessment of the child's situation, the Oklahoma statute is actually more restrictive than the federal entitlement, rather than more expansive. We cannot reconcile that interpretation with the individualized review demanded by the Act. As an example which is not uncommon, what of the child who has not shown regression in the past, but for whom other factors, such as acceleration of his or her deficiencies with increased physical maturity, outweigh the lack of past egregious regression? Under the Act, both documentation concerning past regression and predictions of future regression should be considered, an analysis which requires investigation into many aspects of the child's educational, home, and community life.

Turning to the case before us, a thorough review of the entire administrative record reveals it to be focused exclusively on a limited regression-recoupment analysis, which itself is vigorously disputed with opposing competent testimony and evidence.[8] Because of the conflict in evidence concerning Natalie's past regression, other factors, including some or all of those discussed above,[9] should have been considered as part of the evaluation of whether Natalie's IEP is "appropriate" for her individual circumstances. However, there was scant factual development in the record from the administrative proceedings concerning many aspects of Natalie's life.[10] Because the record focuses so completely on only one component of Natalie's education, we do not have sufficient facts to make an informed disposition on the merits of this case, and we therefore express no opinion as to whether Natalie's IEP is "appropriate" under the Act's mandate. We do hold, however, that those who conducted the administrative review, the administrative appeal, and the federal district court review of that administrative process erred by converting what should have been a multifaceted inquiry into application of a single, inflexible criterion.

As to the first issue, therefore, we reverse summary judgment in favor of the schools and remand the case for further proceedings, which should include presentation and consideration of evidence concerning other factors in addition to the regression-recoupment evaluation previously conducted, relevant to a decision as to whether a structured educational summer program should be included as part of Natalie's IEP.

IV.

As to the second issue, whether the CDC is a necessary party to the suit, the hearing officer did not render any finding or conclusion. The appeals officer found that the CDC was not a necessary party because Natalie's program is the legal responsibility of the local education agency, the Bixby school district, "under state and federal law and regulation." Appeal review decision at 2, 3 (citing the Oklahoma statute and 34 C.F.R. § 506). The magistrate held: "The Children's Developmental Center is not a proper party to this action, being a cooperative effort pursuant to 70 O.S. § 13-101(2)." Report and Recommendation at 19 n.15. The district court found that it did not need to address the issue after it granted the schools' motion for summary judgment.11 Section 1415(b)(2) of the Act provides that:

> Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency.

The Oklahoma State Department of Education has designated the "local education agency" as the proper party to respond to a parental request for due process review of a child's placement or program. See Policies and Procedures Manual for Special Education in Oklahoma at 53 (1988). By letter to counsel for the Johnsons dated June 5, 1987, the Oklahoma State Department of Education clarified that their request for review of Natalie's program must be forwarded to the superintendent of the Bixby Public Schools.

In theory, the CDC could be considered a "local educational agency" under the definitions given in the Act and in the regulations implementing the Act, see 20 U.S.C. §§ 1401(a)(8), 1401(a)(22); 34 C.F.R. § 300.8. However, the Act states clearly that the request for due process review is to be made to only one party, which may be designated by the state board of education. 20 U.S.C. § 1415(b)(2)(The "due process hearing. . .shall be conducted by the State educational agency or by the local educational agency or the intermediate educational unit, as determined by. . .the State educational agency.") (emphasis added). The Oklahoma State Board of Education has designated the local school district as the responsible party, consistent with the Act.12 Thus, the CDC is not a necessary party to this action.

The order of the district court is REVERSED and the matter is REMANDED for further proceedings consistent with this opinion.

1 The cooperative provision of services is statutorily approved by Okla. Stat. tit. 70, § 13-101 (1989 & Supp. 1990), which provides in pertinent part:

> Two or more school districts may establish cooperative programs of special education for exceptional children when such arrangement is approved by the State Board of Education. The county superintendent of schools of any county may establish and maintain a special education program, with the approval of the State Board of Education, and county funds may be expended for such purpose. Any school district or districts located wholly or in part in a county may participate in any such program so established by the county superintendent of schools and shall have authority to contribute school district funds, either directly or by reimbursement to the county participating in such program.. . .
>
> It shall be the duty of each school district to provide special education for all exceptional children as herein defined who reside in that school district. This duty may be satisfied by:
>
> . . .
>
> 2. The district joining in a cooperative program with another district or districts to provide special education for such children.. . .

2 The court in Campbell v. Talladega County Board of Education, 518 F.Supp. 47 (N.D. Ala. 1981), explained that:

> The preponderance of the evidence standard codified at 20 U.S.C. § 1415(e)(2) reflects a decision to accord a greater role in the enforcement scheme to the federal courts. The original House version which provided that the determination of the state agency would be "conclusive in any court of the United States if supported by substantial evidence" was rejected by the conference committee and the present language was substituted.

Id. at 53 n.9 (citation omitted); see also David D. v. Dartmouth School Comm., 775 F.2d 411, 420 (1st Cir. 1985)(federal courts do not have to assume deference to the administrative hearing officers' decisions under the Act, for to do so would be tantamount to elevating the decisions of the administrative hearing officer to that of the highest state court, clearly an inappropriate outcome), cert. denied sub nom. Massachusetts Dept. of Educ. v. David D., 475 U.S. 1140 (1986).

3 The Alamo Heights case, in which the court found that the child in question should receive a structured summer educational

program, resembles the case before the court today in that the testimony concerning the child's regression-recoupment tendencies was directly conflicting: "[T]he School District's employees and consultants were unanimous that they observed no significant regression, while the doctors, therapists, and former teachers who testified on behalf of [the child] all agreed that [the child] required a continuous structured program in order to prevent significant regression." Id. at 1159.

4 We are aware that at least one district court has limited the provision of summer educational programs to those children who can prove irreparable regression. In Bales v. Clarke, 523 F.Supp. 1366 (E.D. Va. 1981), the court held that "[p]laintiff is. . .not entitled to year-round schooling without showing an irreparable loss of progress during summer months." Id. at 1371. The Bales court relied on Anderson v. Thompson, 495 F. Supp. 1256, 1266 (E.D. Wis. 1980), aff'd, 658 F.2d 1205 (7th Cir. 1981)(affirming district court denial of compensatory damages and attorney's fees).

We disagree with the Bales court, not only in its holding under the Act, but also with its implication that Anderson supports its conclusion. In Anderson, a case involving a child whose diagnosis and proposed educational program were disputed, the district court, without citing any legal authority, declined to order the local school district to provide a summer program because the student's academic regression was not predicted to be more severe than that of a nonhandicapped student. Id. at 1266. Cf. Rettig v. Kent City School Dist., 539 F. Supp. 768, 778-79 (N.D. Ohio 1981) (regression standard is appropriately applied; the child whose program was the subject of this case had displayed periods of regression year-round; "[I]f on the basis of a multi-factored evaluation, at new IEP for [the child] called for summer school," the school must so provide with state funding)(emphasis added), aff'd in pertinent part and partially vacated on other grounds, 720 F.2d 463 (6th Cir. 1983), cert. denied, 467 U.S. 1201 (1984).

5 It is important to be careful when using the term "maximization" in the educational setting. For example, the district court in Bales v. Clarke wrote as if the phrase "'maximizing' the plaintiff's educational opportunities" were synonymous with the idealistic goal of "'maximum educational progress' through the 'best' education available, without regard to costs." 523 F. Supp. at 1371. However, these concepts are not synonymous. The former describes making the best use of the educational program which has been determined to be appropriate for the child, including balancing the needs of the local school district with the resources available to meet those needs. The latter describes the utopian ideal of providing unlimited services to every child, a goal which has been uniformly recognized as unreachable and inappropriate, given the press of needs in our communities. The

former is mandated by the Act; the later is not. Indeed, most professional educators would agree that it is a theoretical as well as a physical and financial impossibility to establish an educational program which "maximizes" each child's educational potential.

6 These financial burdens have offsetting financial benefits. See Polk, in which the Third Circuit stated:

> A chief selling point of the Act was that although it is penny dear, it is pound wise---the expensive individualized assistance early in life, geared toward teaching basic life skills and self-sufficiency, eventually redounds to the benefit of the public fisc as these children grow to become productive citizens.

853 F.2d at 181-82; accord Rowley, 458 U.S. at 201 n.23.

7 Okla. Stat. tit. 70, § 13-101 provides in pertinent part:

> Funds may be expended for school services for an additional period not to exceed forty (40) days during the summer months for approved programs for qualified children, who are severely or profoundly multiple-handicapped, provided their individualized education program (I.E.P.) states the need for a continuing educational experience to prevent loss of educational achievement or basic life skills.

8 This dispute alone, concerning material factual matters, renders inappropriate the district court's grant of summary judgment.

9 The list of possible factors includes the degree of impairment, the degree of regression suffered by the child, the recovery time from this regression, the ability of the child's parents to provide the educational structure at home, the child's rate of progress, the child's behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with nonhandicapped children, the areas of the child's curriculum which need continuous attention, the child's vocational needs, and whether the requested services is extraordinary for the child's condition, as opposed to an integral part of a program for those with the child's condition. This list is not intended to be exhaustive, nor is it intended that each element would impact planning for each child's IEP.

10 E.g., the record reveals that for at least two summers, 1985 and 1986, Natalie's parents had applied for her participation in the "Laura Dester program," a program run by the Oklahoma

Department of Human Services for handicapped children living at home. The program is apparently one of nonprofessionals working with parents in the home during the summer, using the child's IEP for guidance. The record is completely undeveloped as to whether there is any cost to the parents for this program, or why Natalie did not attend it. The record also contains an unexplained school memo to file indicating that a speech pathologist from the Laura Dester program who was assigned to work with Natalie during the summer of 1986 visited her classroom to observe the techniques Natalie's teacher was employing, although in fact Natalie did not attend that program in 1986.

11 On appeal, the schools argue that this issue is not properly before us because Natalie's counsel did not address it in the complaint before the district court. The district court stated that, "The plaintiff has not specifically objected to this conclusion." Order at 4. However, the record reveals that the complaint specifically and repeatedly requested federal court review of this issue. See, e.g., R. Vol. I, tab 1 at 4-7. This comment of the district court was plain error, but the error is harmless under our holding today.

12 At the hearing, the hearing officer sustained the schools' objections to questions about whether any of the seven other children in Natalie's class at the CDC were attending summer programs. The schools' objections were based in part on the fact that the programs for other children were not relevant to Natalie's program, and in part that other students "are not even students this school district has any responsibility for." R. Vol. II, tr. at 103.

Under our holding today, it is clear that the question of what services are regionally available to a child with a particular handicap can be relevant to the evaluation of the schools' responsibility to provide a structured summer educational program. We trust that our intent to encourage broad information gathering during the evaluation process is clear, and that on remand, all relevant information will be included, in an attempt to achieve the balance of individual need and public resources which Congress envisioned.

21 IDELR 933
41 F.3d 1223

Light v. Parkway C-2 Sch. Dist.

Martin LIGHT; Diane Light; Lauren Light, a minor by and through
Martin and Diane Light, her next friends,
Appellants
v.

PARKWAY C-2 SCHOOL DISTRICT; SPECIAL SCHOOL DISTRICT OF ST. LOUIS

COUNTY, Appellees

No. 94-2333

U.S. Court of Appeals, Eighth Circuit

DECEMBER 2 1994

* Discipline, Injuctive Relief

* Discipline, Interim Educational Placements

* Practice and Procedure, Injunctions

Summary
A district placed a 13-year-old student whose diagnoses had included behavioral and conduct disorder, pervasive development disorder, mild to moderate mental retardation, autism, language impairment, and organic brain syndrome in a self-contained classroom for students with mental disabilities which was operated by a district for students with special needs. The student received regular education for physical education, art, computer lab, home economics, and library. During the year, the student exhibited behaviors such as biting, hitting, kicking, poking, throwing objects, and turning over furniture. The student's IEP team considered changing the student's placement, and decided that she should be moved to a self-contained classroom for children with autism in a neighboring district. During the IEP proceedings, the parents sought due process and maintained the placement by invoking the "stay-put" provision of the IDEA. Then, the student hit another special education student on the head. That same day, an informal hearing was held at which neither parent was present and the student was suspended for 10 days. The parents filed an action seeking to have the suspension lifted on the grounds that the student was not afforded due process. The districts counterclaimed and obtained an injunction to remove the student from school pending the resolution of the administrative proceedings. The parents appealed.

HELD: for the districts.

BEST COPY AVAILABLE

The circuit court set out a two-part test to be met by a district prior to removing an allegedly dangerous child from his or her educational placement. It held that the district court properly interpreted and understood the first part of its test---that maintaining the child in the placement was "substantially likely to result in injury" to the child or others. The record was replete with examples of the student's violent behaviors as well as conduct which threatened her own well-being. The district court failed to make a determination regarding the second part of the test---the requirement that the districts took reasonable steps to minimize the student's risk of injury. Nonetheless, the circuit court found that in addition to her classroom teacher, the student was provided with a full-time teacher and one full-time teacher's assistant, both of whom were appropriately certified, and the teaching staff received extensive training and support in behavior management, inclusion, and crisis prevention and intervention. Thus, the circuit court concluded that the districts satisfied their burden under both parts of its test, and that the district court properly removed the student from her placement. As to the appropriate interim placement for the student pending the completion of due process proceedings to determine her appropriate long-term placement, the circuit court said that deference should be given to the district's proposal.

Counsel for Parents: Michael Finkelstein, Missouri Protection of Advocacy Systems.
Counsel for District: James Thomeczek, Peper, Martin, Jensen, Maichel, and Hetlage.
Before Fagg, Circuit Judge, Heaney, Senior Circuit Judge, and Bowman, Circuit Judge.
HEANEY, Senior Circuit Judge.
On Appeal from the United States District Court for the Eastern District of Missouri.

This appeal concerns a school district's attempt to change the educational placement of an allegedly dangerous mentally disabled child. Two issues are raised on appeal: (1) whether the Supreme Court's holding in Honig v. Doe, 484 U.S. 305 (1988), requires a district court to find that a child is not only "substantially likely to cause injury" but also "truly dangerous" before sanctioning a transfer, and (2) whether a school district must make a reasonable accommodation of the child's disability before it can change her placement. We reject the former contention, but agree with the latter. We hold that the district court in this case erred by refusing to consider whether Lauren Light's disabilities had been reasonably accommodated. Nevertheless, based upon our independent review of the record, we conclude that a reasonable accommodation was made, and we affirm the court's order that Lauren Light be removed from her current placement.

I. Factual Background

Lauren Light is a thirteen-year-old child with multiple mental disabilities. She has been diagnosed at various times as demonstrating behavioral disorder, conduct disorder, pervasive developmental disorder, mild to moderate mental retardation, certain features of autism, language impairment, and organic brain syndrome. Behind these diagnostic labels stands a child whose condition leaves her prone to impulsive, unpredictable, and aggressive behavior. According to her parents, Lauren is "sometimes defiant, easily frustrated, irritable, impulsive, and easily distracted." Plaintiffs' Motion for Temporary Restraining Order at 2. Moreover, Lauren "sometimes exhibits aggressive behaviors such an kicking, biting, hitting and throwing objects." Id.

For the 1993-94 school year, Lauren was enrolled in a self-contained classroom for students with mental disabilities at Parkway Certral Middle School, a public middle school in Chesterfield, Missouri. The classroom is operated by the Special School District ("SSD") of St. Louis County, a public entity devoted to educating children with special needs. During the prior school year, Lauren had been placed in a self-contained classroom at Riverbend Elementary School. Seeking greater educational opportunities for Lauren, her parents advocated for and obtained a transfer to Parkway Central Middle School, arguing that Lauren's behavior might improve amid similarly-aged peers.

Federal law requires disabled children like Lauren to be educated pursuant to an Individualized Education Program, ("IEP"), a comprehensive document which sets forth objectives, policies, and guidelines and which governs their day-to-day schooling. Developed by a team of educators, specialists, consultants, administrators, and her parents, Lauren's IEP outlined an extensive set of duties on the part of the SSD to accommodate Lauren's disabilities. Lauren's IEP required that she have two-on-one staff support at all times. Thus, In addition to the classroom teacher assigned to her room, Lauren was accompanied by one full-time teacher, Jane Galownia, and one full-time teacher's assistant, Lynn Wilson, throughout the school day. Both Galownia and Wilson have been certified by the State of Missouri to teach students with mental handicaps, behavioral disorders, and learning disabilities.

In addition, the SSD provided special training to members of the staff who regularly came into contact with Lauren, including training in behavior management, inclusion, and crisis prevention and intervention. To ease the transition from Riverbend, the SSD agreed to retain the services of a consultant selected by the Lights, Mary Granville of the Judevine Center for Autistic Children. Granville had worked with Lauren at Riverbend to facilitate her inclusion in the regular school environment, and performed a similar role in planning for and assisting with Lauran's transition to Parkway Central Middle School. Lauren's curriculum included speech therapy, occupational therapy, physical therapy, instruction in daily living skills, adapted physical education, functional academics, and weekly community access opportunities. Lauren's teachers kept daily logs of her activities and behavior and provided daily reports to her parents. Outside of the special education classroom, Lauren was enrolled in several courses in the regular classroom setting with her nondisabled peers, including physical education, art, computer lab, home economics, and library. The SSD provided staff support for Lauren to participate in after-school activities. In September of 1993, the SSD agreed to a request by Lauren's parents that she be provided music therapy twice a week. When Lauren's music therapist became ill, the SSD hired a replacement and increased the frequency of the lessons to three a week to make up for lost instructional time. No other SSD student was provided with music therapy.

At Parkway Central Middle School, Lauren exhibited a steady stream of aggressive and disruptive behaviors, such as biting, hitting, kicking and poking persons, throwing objects, and turning over furniture. School records document that in the two years prior to her suspension Lauren committed eleven to nineteen aggressive acts per week, with a mean of fifteen per week. Her daily tally of aggressive acts ranged from zero to nine, with a mean of three per day. Of these incidents, approximately thirty required the attention of the school nurse.

The record suggests that Lauren's aggressive behaviors had a negative effect on the educational progress of the five other special education students in Lauren's program. The teacher in charge of the self-contained classroom, Suzanne Seibel, reported that the class was rarely able to complete lesson plans due to Lauren's frequently disruptive behavior. In letters to the director of special education for the SSD, parents of some of the other students in Seibel's class expressed concerns that the classroom environment had become tense and stressful, that their children's academic and social progress had slowed or halted, and that the class's field trip schedule had been significantly curtailed. One student required after-school academic support to compensate for the disruptions caused by Lauren's behavior.

Beginning, in November 1993, members of Lauren's IEP team began a process of re-evaluation. Together with Lauren's parents and their attorney, the IEP team met for a full day on March 23, 1994. The team concluded that a change of placement was in Lauren's best interest. Also on the agenda was the request of Lauren's art teacher that Lauren be removed from the art class due to her consistently disruptive behavior toward the other students. The Lights objected to any such removal and requested an administrative hearing on that issue. As a result, the Lights invoked the "stay-put" provision of 20 U.S.C. § 1415(e), which stayed any change in Lauren's placement pending the resolution of the administrative proceedings. The team, the Lights and their attorney reconvened on April 6, 1994, to complete the proposed revision of Lauren's IEP, and to address the team's conclusion that Lauren should be moved to a self-contained classroom for children with autism in a neighboring school district. Lauren's parents disagreed with any change in her placement and exercised their procedural due process rights under federal and Missouri law.

On April 12, during art class, Lauren grabbed and tugged the hand of another special education student. With her free hand Lauren then hit the student three times on the head. Later that day, following an informal hearing at which neither of Lauren's parents was present, the principal of Parkway Central Middle School imposed a ten-day suspension on Lauren for her behavior. Under federal and Missouri law, a suspension of ten days or less does not constitute a change of placement, and thus will not invoke the stay-put requirement. Mo. Rev. Stat. § 167-171 (1986).

II. Procedural History

Lauren's parents brought this action in the district court seeking to have the suspension lifted because Lauren was not afforded due process. Parkway School District and the SSD counterclaimed and invoked the court's equitable power to remove Lauren from Parkway pending the resolution of the Lights' administrative challenge to the proposed revisions to Lauren's IEP, including the proposed change in placement. 20 U.S.C. § 1415(e)(2). Parkway and the SSD argued that Lauren's aggressive behaviors presented a substantial risk of injury to herself and others in her current educational placement. After one day of testimony, the district court ruled that Lauren had been denied due process and granted the Light's motion for a temporary restraining order. Noting that her parents were not specifically informed of the suspension hearing, the court apparently believed that Lauren's disabilities rendered her unable to advocate on her own behalf and unable to understand why she was being suspended. Following two additional days of testimony, however, the court vacated the temporary restraining order and instead granted the school districts' motion for an injunction removing Lauren from Parkway Central Middle School. The court found that "maintaining Lauren in her current placement is substantially likely to result in injury either to herself or to others." The court refused to inquire into the adequacy of the school districts' efforts to accommodate Lauren's disabilities. The court further declined to make any assessment as to the best alternative placement for Lauren.

III. The Individuals With Disabilities Education Act

The Individuals With Disabilities Education Act (IDEA) codifies the goal that "all children with disabilities have available to them. . .a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.. . ." 20 U.S.C. § 1400(c). Like its predecessor statute, the Education for All Handicapped Children Act of 1975,

the IDEA provides certain federal funds to states whose policies "ensure[ ] all children with disabilities the right to a free appropriate public education." Id. § 1412(1).
At the heart of the IDEA lie two broad mandates, one substantive and one procedural. First, the IDEA seeks to guarantee the educational rights of disabled children by requiring policies of inclusion. Specifically, schools must

> assure that, to the maximum extent appropriate, children with disabilities. . .are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.. . .

Id. § 1412(5)(B). As the Third Circuit has recently reiterated, "this provision sets forth a 'strong congressional preference' for integrating children with disabilities in regular classrooms." Oberti v. Board of Educ., 995 F.2d 1204, 1213-14 (3rd Cir. 1993) (citations omitted). In the words of the implementing regulations, schools must educate disabled children in the "least restrictive environment." 34 C.F.R. § 300.550.

Second, the IDEA mandates that participating states extend to disabled children, parents, teachers, school officials, and educational institutions a host of procedural protections and administrative safeguards. 20 U.S.C. § 1415. Schools must afford parents of disabled children the opportunity to participate in educational decisions. States must establish an administrative review apparatus to resolve disputes between parents and school officials over, for example, the proper educational placement for a disabled child. Under the IDEA, parents are entitled to notice of proposed changes in their child's educational program and, where disagreements arise, to an "impartial due process hearing." Id. § 1416(b)(2). Once the available avenues of administrative review have been exhausted, aggrieved parties to the dispute may file a civil action in state or federal court. Id. § 1415(e)(2).

The IDEA includes a "stay-put" provision, under which the disabled child "shall remain in the then current educational placement of such child" during the pendency of administrative or Judicial review, unless "the State or local educational agency and the parents or guardian otherwise agree on an interim placement." Id. § 1415(e)(3). By preserving the status quo ante, the stay-put provision ensures an uninterrupted continuity of education for a disabled child pending administrative resolution. See Logsdon on Behalf of Logsdon v. Board of Educ. of Pavilion Cent. School Dist., 765 F. Supp. 66 (W.D.N.Y. 1991).

In Honig v. Doe, 484 U.S. 305 (1988), the Supreme Court declined to find an implied exception to the stay-put provision for assertedly "dangerous" children. The Court held that Congress intended "to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school." Id. at 323 (emphasis in original). A school seeking to remove a dangerously disruptive child from her current educational placement can overcome the automatic stay-put injunction only by obtaining the permission of the parents or the equitable sanction of a court. Acting alone, school officials are restricted to "'normal procedures for dealing with children who are endangering themselves or others,'" such as "study carrels, timeouts, detention, or the restriction of privileges." Id. at 325 (quoting Comment following 34 C.F.R. § 300.513 (1987)). In addition, "where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 school days." Id.

Emphasizing that the IDEA "does not leave educators hamstrung," id. at 325, the Supreme Court outlined the standard for judicial intervention when a school is confronted with a dangerous student:

> [S]chool officials are entitled to seek injunctive relief under § 1415(e)(2) in appropriate cases. In any such action, § 1415(e)(3) effectively creates presumption in favor of the child's current educational placement which school officials can overcome only by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others.

Id. at 328.

This test looks only to the objective likelihood of injury. We reject as tautological the contention of Lauren's parents that a disabled child must be shown to be "truly dangerous" as well as substantially likely to cause injury. Their argument derives from a misreading of Honig and warrants no extensive rebuttal. More importantly, we reject their suggestion that schools can only remove children who intend to cause injury. The Lights argue that a mentally disabled child cannot be a "dangerous" child within the meaning of Honig when that child's disability renders her unable to intend the injuries she inflicts. A child's capacity for harmful intent play no role in this analysis. Even a child whose behaviors flow directly and demonstrably from her disability is subject to removal where that child poses a substantial risk of injury to herself or others. We note that in the case of dangerous disabled children the purpose of removal is not punishment, but "maintaining a safe learning environment for all. . .students." Id. Moreover, the removal of a dangerous disabled child from her current placement alters, but does not terminate, her education under the IDEA.

In addition to this threshold standard, we hold today that there is an essential second test which must be met by a school district seeking judicial sanction for the removal of a dangerous disabled child: The school district must show that it has made reasonable efforts to accommodate the child's disabilities so as to minimize the likelihood that the child will injure herself or others. This second inquiry is necessary to ensure that the school district fulfills its responsibility under the IDEA to make available a "free appropriate public education. . .for all handicapped children.. . ." 20 U.S.C. § 1412(2)(B). While we do not intend to expand district court removal hearings into wide-ranging assessments of entire educational programs, we believe that school districts should not seek to remove disabled children until reasonable steps have been taken to mitigate the threat of injury. The scope of this inquiry is indicated by 20 U.S.C. § 1412(5)(B), which requires that the "removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.. . ." Before exercising its equitable authority to remove a disabled child from any placement, a district court should be satisfied that the school district has made reasonable use of "supplementary aids and services" to control the child's propensity to inflict injury.

In sum, a school district seeking to remove an assertedly dangerous disabled child from her current educational placement must show (1) that maintaining the child in that placement is substantially likely to result in injury either to himself or herself, or to others, and (2) that the school district has done all that it reasonably can to reduce the risk that the child will cause injury. Where injury remains substantially likely to result despite the reasonable efforts of the school district to accommodate the child's disabilities, the district court may issue an injunction ordering that the child's placement be changed pending the outcome of the administrative review process.

IV. Is Lauren's Placement at Parkway Central Middle School Substantially Likely to Result in Injury?

For reasons outlined above, we conclude that the district court properly understood the first prong of our two-part test. Reviewing the evidence of Lauren's disruptive behavior at Parkway Central Middle School, the district court expressed its conviction "that should this behavior continue in the Parkway [Central] Middle School, Lauren will either injure herself or another" and found that "maintaining Lauren Light in her current educational placement is substantially likely to result in injury either to herself or to others."

These conclusions constitute findings of fact, which we must uphold unless clearly erroneous. Craft v. Metromedia, Inc., 766 F.2d 1205, 1212 (8th Cir. 1985), cert. denied, 475 U.S. 1058 (1986). "[W]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985). Deference is due "even when the district court's findings do not rest an credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." Id.

The record amply supports the district court's findings. The record exhaustively documents Lauren's almost daily episodes of aggressive behavior at Parkway Central Middle School. The undisputed testimony of several witnesses reveals that Lauren kicked, hit, and bit her teacher, Jane Galownia, at least several times a week. At various times, Lauren has hit, kicked, and slapped other disabled and non-disabled students; thrown pencils and other objects at other students' eyes, ears and faces; and attempted to overturn desks and tables. As noted above, Lauren's daily log has recorded a mean incidence of fifteen aggressive acts per week. Dr. Joseph Jones, the Director of Special Education for Lauren's region, testified that Lauren's aggressive behavior varies cyclically and might generate anywhere from zero to fifteen incidents on a given day.

The following undisputed incidents are illustrative of Lauren's capacity to inflict injury. On January 12, 1994, Lauren poked another student in the stomach with a pencil, slapped Galownia, slapped another student, and hit Galownia in the face with her head. On January 13, 1994, Lauren slapped Galownia twice. On January 31, 1994, Lauren grabbed Galownia's hand and bit down hard on her thumb for about fifteen seconds. Lauren released the thumb upon the intervention of Mary Granville, the specialist and consultant, who happened to be present that day for observation. On both February 1 and 2, 1994, when Galownia was assisting with the use of a sewing machine, Lauren bit her teacher's arm. On February 3, 1994, Lauren hit Galownia and threw a crayon at another student, striking him in the face.

On March 3, 1994, Lauren bruised a nondisabled student by slapping his face as she ran from the gym, and later bit Galownia on the hand. On March 18, 1994, while on a community access trip, Lauren dashed into the street at an intersection. After Galownia intervened to retrieve her, Lauren kicked Galownia and hit Suzanne Seibel. When they rejoined the group, Lauren kicked another student. On March 24, 1994, Lauren bit Galownia an the neck while giving her a hug. On April 12, 1994, Lauren grabbed the hand of another disabled student and struck him three times on the forehead and head, raising her hand back to her head with each blow. Later that day at the suspension hearing, Lauren kicked Galownia several times.

Our account of these behavior is neither detailed nor complete, but serves only to illuminate our holding that the district court's findings are not clearly erroneous.

In addition, the district court heard testimony that Lauren had occasionally engaged in behaviors which threatened injury to herself. Lauren frequently placed objects in her mouth, including toxic markers. Dr. Toni Strieker, the Area Coordinator for the SSD, testified that other students at Parkway were aware of Lauren's pattern of physical aggression and were likely to strike back at her to defend themselves when attacked. Dr. Joseph Jones, the Director of Special Education for Region V in the SSD, testified that other students displayed increasing anxiety and fear around Lauren due to the cumulative effect of her behaviors and to the students' awareness of the inability of the teaching staff to protect them entirely.

The record contains little evidence that Lauren's aggressive behaviors have decreased in frequency or severity since her arrival at Parkway Central Middle School. Dr. Jones testified that Lauren's behavior had not changed over the previous two years.

The Lights argue that the district court's findings are clearly erroneous because Lauren's behaviors amounted to no more than a nuisance. The Lights stress that Lauren only once punctured Galownia's skin, that no medical treatment by a physician has been required, and that the police have never been called to restrain Lauren. In general the Lights claim that the district court failed to employ an adequately specific and stringent definition of "injury." We disagree. As an initial matter, we emphatically reject the contention that an "injury" is inflicted only when blood is drawn or the emergency room visited. Bruises, bite marks, and poked eyes all constitute "injuries" in the context of this analysis. More broadly, we reject the proposition that a child must first inflict serious harm before that child can be deemed substantially likely to cause injury.

We affirm the district court's use of the Honig test and find no clear error in its findings of fact.

V. Have the School Districts Taken Reasonable Steps to Minimize Lauren's Risk of Causing Injury?

We find that the district court erred in its refusal to ascertain whether Parkway School District and the SSD have made reasonable efforts to accommodate Lauren's disabilities. As already noted, this inquiry should not be a wide-ranging review of all aspects of a student's educational program, but should focus on whether the school district has done all it reasonably can to minimize the risk of resulting injury through the use of "supplementary aids and services." See 20 U.S.C. § 1412(5)(E). Based upon our independent review of the record, we conclude that the school districts have taken reasonable steps to minimize Lauren's propensity to cause injury. A fuller discussion of the school districts' efforts is contained in the factual summary above, and we need not repeat it here.

The Lights contend that Lauren would be less likely to cause injury if her teachers were better trained. They rely on the testimony of Mary Granville, the consultant retained by the SSD to facilitate Lauren's transition to Parkway Central Middle School. Granville testified that she "would expect" more training to result in "fewer. . .incidents of biting and kicking. . ." Tr. 2-147-48. Granville's testimony was contradicted by several witnesses, including Dr. Toni Strieker, the Area Coordinator for the SSD. Strieker gave her professional opinion that the assistance of inclusion facilitators, behavior management specialists, special education consultants, and crisis prevention trainers had produced no reduction in the frequency of Lauran's aggressive behaviors. We note that extensive training and support have already been provided. Lauren's teacher, Jane Galownia, and teacher's assistant, Lynn Wilson, have been appropriately certified by the State of Missouri. In addition, Galownia received specific training from Mary Granville at the beginning of the school year and consulted with her from time to time during the ensuing months. All of the teachers and staff in Lauren's classroom received training in crisis prevention and intervention, in behavior management strategies, and in inclusion practices. The SSD also provided periodic assistance from its staff of inclusion facilitators.

Based upon these uncontradicted facts, we conclude that the school districts took reasonable steps to train and prepare Lauren's teaching staff. The Lights have put forward no other alternative measures that they believe the school districts should reasonably be required to attempt.

In short, the school district has met its burden under both prongs of the two-part test we adopt today. The district court committed no clear error in finding that Lauren Light's placement at Parkway Central Middle School was substantially likely to result in injury, either to herself or to others. Moreover, we conclude that Parkway School District and the SSD made reasonable efforts to minimize the risk that Lauren would inflict injury. Thus, we hold that Lauren Light was properly removed by the district court from Parkway Central Middle School.

VI. Lauren's Interim Placement

Finally, we are confronted with the issue of the proper interim placement for Lauren pending the resolution of the Lights' administrative challenge to the new long-team educational placement proposed by Lauren's IEP team. The parties apparently disagree about whether Lauren should be temporarily placed at the Neuwoehner School, a segregated facility for disabled children, or in a self-contained classroom for children with autism at the Brittany Woods School in a neighboring school district. Given the

temporary nature of the interim placement and the safety concerns which motivate the
removal, we believe that due deference should be accorded to the determination of the school district. We emphasize that the interim placement should be maintained only until Lauren's long-team placement is finalized through the IDEA's administrative review process. See 20 U.S.C. § 1415.

VII. Conclusion

We uphold the district courts a finding that maintaining Lauren Light at Parkway Central Middle School is substantially likely to result in injury, either to Lauren or to others. Based upon our independent review of the record, we further find that Parkway School District and the SSD have made reasonable efforts, through the use of supplementary aids and services, to minimize the risk that Lauren will inflict injury at her current placement. We affirm the order of the district court that Lauren Light be removed from Parkway Central Middle School until such time as her long-term educational placement has been decided through the appropriate administrative channels.

23 IDELR 334
Neely v. Rutherford County Sch.
Samantha NEELY, George Neely, Carol Neely,
Plaintiffs-Appellees
v.

RUTHERFORD COUNTY SCHOOL,

Defedant-Appellant

No. 94-5755

U.S. Court of Appeals, Sixth Circuit

NOVEMBER 2 1995

* MEDICAL SERVICES

* ORTHOPEDIC IMPAIRMENT

* Related Services, Medical Services

* Personnel, Nurses

Summary

The parents of a seven-year-old student with Congenital Central Hypoventilation Syndrome sought full-time nursing services for her while she attended school. The child had a breathing tube which required suctioning and if the tube became dislodged, resuscitation was necessary to keep her alive. The district offered a nursing assistant to provide this care, but the parents maintained that she required a nurse or respiratory care professional to provide these services. After an administrative law judge (ALJ) ruled that the district was not required to pay for this care, the parents filed suit in district court. The district court ordered the district to provide the professional nursing services, and the district appealed.

HELD: for the district.

Initially, the circuit court pointed out that the Supreme Court's application of the medical services exclusion in the Tatro case was not grounded upon the purpose for which the service was performed, but rather, was dependent upon who provided the service and the burdens associated with it. Additionally, it said that risk and school liability were appropriate factors to take into account in determining whether to provide a service of a medical nature. With these considerations in mind, the circuit court found it significant that the student required almost constant care demanding nearly full-time medical attention and that the student could die without the necessary services. Thus, in its estimation, the nature of the "private duty" care which was required was inherently burdensome. Since the district court did not give its finding of constant care sufficient weight in its determination that the requested care could be provided without undue burden on the district, its conclusion that the care was not excessive was erroneous. Thus, the circuit court held that the care requested by the student did fall within the medical services exclusion to the IDEA and reversed the decision of the district court.

Counsel for Parents: Gary D. Buchanon, Nashville, TN.

Counsel for District: Jeffrey L. Reed, Murfree, Cope & Moore, Murfreesboro, TN.

Before Wellford, Milburn, and Suhrheinrich, Circuit Judges.

HARRY W. WELLFORD, Circuit Judge.

On Appeal from the United States District Court for the Middle District of Tennessee. Prior ruling reported at 21 IDELR 373.

We are called upon here to interpret the scope of the "medical services" exclusion to the Individuals with Disabilities Education Act. ("IDEA"), 20 U.S.C. § 1401(17). Plaintiff Samantha Neely is a seven-year-old child who attends school in Rutherford County. Samantha suffers from a medical condition which required that she receive a tracheostomy. As a result of her condition, Samantha must undergo regular suction of throat, nose, and mouth areas in order to avoid serious and, even life threatening, health consequences. George and Carol Neely, Samantha's parents, believe that the IDEA obligates Rutherford County to provide Samantha with suctioning services while she is in school and that Tennessee law requires that those services be provided by a licensed medical professional. The district court agreed with plaintiffs and rejected Rutherford County's contention that such services were "medical services" that Congress specifically excluded under the IDEA. For the reasons stated below, we REVERSE the decision of the district court.

I. Statement of Facts

There is little dispute concerning many of the facts of this controversy. Samantha Neely suffers from Congenital Central Hypoventilation Syndrome, an extremely rare condition that causes breathing difficulties. Samantha's tracheostomy procedure was necessary to assist her breathing. The procedure creates an opening in the throat, known as a stoma, through which a breathing tube is inserted. This tube must remain in place at all times, but the tube can be dislodged relatively easily if Samantha coughs or even adjusts her clothing. Should the tube become dislodged, Samantha's respiratory functions will cease or become shallow, she will lose consciousness, and she will die if full breathing is not quickly restored.

As a result of the tracheostomy, Samantha is unable to expel throat, mouth, and nose secretions. Consequently, she must regularly suction her breathing passage by mechanical device to ensure that the secretions do not create a blockage; such a blockage would lead to death if not quickly cleared. The number of times Samantha must be suctioned each day varies with the season and with Samantha's health. For instance, when Samantha has a cold, she must be suctioned approximately every twenty minutes; when Samantha is in good health, she may need to be suctioned only after meals.

If Samantha's breathing stops, she may require ventilation with an AMBU bag, which is a device that artificially pumps air into the lungs. If care is not administered within a very few minutes, serious brain damage or death will occur. Samantha is unable to provide her own tracheostomy care. A well-trained individual is required because insertion of the breathing tube can be difficult. The suctioning process must be carefully performed to avoid injury to Samantha and there is little margin for error when resuscitation methods are required. Given the short response time available in emergency situations, the care giver must have sufficient training to avoid panic. Samantha's attendant must devote considerable amounts of his or her attention to Samantha and must be readily accessible to her.

During her first year of school, Samantha's parents alternately attended school with Samantha to provide the care she needs. Due to the illness of another child, however, the Neelys petitioned the school district to hire a full-time nurse or respiratory care professional to attend to Samantha during the coming school year. Rutherford County initially agreed to employ an attendant with the requisite training and revised Samantha's individualized educational plan ("IEP") accordingly. The school district, however, subsequently hired an individual with only a nursing assistant's certification. The Neelys objected and removed Samantha from school when the care requested was not promptly provided. After a meeting with school officials to determine why it had not hired a respiratory care professional, the parties agreed that Samantha would receive home instruction until the Education Department could determine whether Rutherford County had to hire a nurse to provide in-school, full-time care for Samantha.

Samantha's parents requested a due process hearing before the Tennessee Department of Education. On October 28, 1993, an administrative law judge (ALJ) held a hearing at which the parties submitted testimonial and documentary evidence. The ALJ concluded that the care requested by Samantha was a "medical service" which Rutherford County was not obligated to provide under the IDEA. After the Education Department entered its final order, Samantha and her parents filed a suit in federal district court seeking judicial review. The district court held a hearing and provided both parties the opportunity to offer evidence. Neither party submitted any evidence at the hearing, but the Neelys submitted the full administrative record to the district court and supplemented the record with the affidavit of George Neely, Samantha's father. After a review of the evidence, the district court found that the services requested by Samantha were supportive services that the IDEA required Rutherford County to provide. In addition, the district court found that these services were not medical services excluded under the Act.

The district court therefore reversed the ALJ's decision and ordered the school district to provide the requested care. Rutherford County filed this timely appeal.

II. Standard of Review

Section 1415(e)(2) of the IDEA provides that "[i]n any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines appropriate." 20 U.S.C. § 1415(e)(2). A preponderance finding is indicated in an IDEA action, Doe ex rel. Doe v. Defendant 1, 898 F.2d 1186, 1190 (6th Cir. 1990), and the Supreme Court has rejected unrestricted de novo review. In Board of Education of the Hendrick Hudson Central School District v. Rowley ex rel. Rowley, 458 U.S. 176, 206 (1982), the Court stated that

> the provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings. And we find nothing in the Act to suggest that merely because Congress was sketchy in establishing substantive requirements, as opposed to procedural requirements for the preparation of an IEP, it intended that the reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself.

Id. (emphasis added). In light of Rowley, we have interpreted § 1415(e)(2) as calling for "a modified de novo review." E.g., Doe ex rel. Doe v. Board of Educ. of Tullahoma City Schs., 9 F.3d 455, 458 (6th Cir. 1993); Thomas ex rel. Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 624 (6th Cir. 1990). This modified standard "requires a de novo review but the district court should give due weight to the state administrative proceedings in reaching its decision." Roncker ex rel. Roncker v. Walter, 700 F.2d 1058, 1062 (6th Cir.), cert. denied, 464 U.S. 864 (1983). We, therefore, give the ALJ's decision appropriate consideration.

III. The Requirements of the IDEA

Congress enacted the IDEA as remedial legislation in order to enhance the educational opportunities of handicapped children. Thomas ex rel. Thomas, 918 F.2d at 619. The Act's overall objective is to guarantee handicapped children a substantive right to a "free appropriate public education." 20 U.S.C. § 1412(1). The IDEA defines the phrase, free appropriate public education (FAPE), as "special education and related services" that are provided at public expense and supervision, that meet state educational standards, and that conform with the IEP developed for each child. Id. § 1401(18). Section 1401(16) defines "special education" as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including---(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education." Id. § 1401(16)(A), (B). Section 1401(17) states that "related services" include

> transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counselling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education.

Id. § 1401(17) (emphasis added).

The issue in the case at bar is whether the care requested by Samantha is a "related service" under the IDEA. If the requested care is a related service, the IDEA obligates Rutherford County to provide the service free of charge.

In deciding whether a service is a "related service" under § 1401(17), we must first answer two subsidiary questions. See Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 890 (1984). We must initially determine whether the requested service is a "'supportive service[ ]. . .required to assist a child with a disability to benefit from special education.'" Id. (quoting 20 U.S.C. § 1401(17)). If not, then the IDEA imposes no obligation on the school system to provide the service. Id. at 894 (explaining that if requested service can be performed at some time other than during the school day then it is not a service "necessary to aid a handicapped child to benefit from special education"). If the requested service is a supportive service, then we must also decide whether the service is a "medical service" which is excluded from the requirements of § 1401(17). Id. at 890.

Rutherford County concedes that the cleaning of Samantha's tracheostomy is a supportive service that is necessary to enable the child to enjoy the benefit of special education. It argues, however, that the requested care is a medical service performed for other than diagnostic and evaluative purposes. The district court acknowledged that "the care requested is clearly medical in nature," but it held that, "[a]bsent evidence that the care requested would be unduly burdensome to the school district, the nursing care will be deemed a related, supportive service that falls outside the medical services exclusion."

By its own terms, § 1401(17) would seem to indicate that a school district pay for only those medical services which are performed for diagnostic and evaluation purposes. Thus, one might assume that a school district is not required under the Act to provide a medical service that is performed for any other purpose. In Tatro, however, the Supreme Court did not focus on the purpose for which the service is performed but determined that the application of the medical services exclusion depends on who provides the service and the burdens associated therewith. Tatro, 468 U.S. at 892-94.

Tatro involved an eight-year-old girl who was born with spina bifida, a congenital birth defect. Id. at 885. The birth defect caused a neurogenic bladder which prevented her from urinating voluntarily. Id. As a result, the child had to undergo intermittent catheterizations every three or four hours. Id. When a child's school district refused to hire personnel to perform the catheterizations, her parents filed suit, alleging that the requested service was a related service which school district was obligated to provide. Id. at 886. The Supreme Court found that the catheterization service was a support service which enabled the child to enjoy the benefits of special education. Id. at 891. The Court then turned its attention to whether the requested service was a medical service excluded under the Act. Id. In finding that the catheterization was not a medical service, the Court relied heavily on regulations issued by the Department of Education which included "school health services" within the definition of related services. Id. at 892 (quoting 34 C.F.R. § 300.13(a)). "School health services" were defined, in turn, as "'services provided by a qualified school nurse or other qualified person.'" Id. (quoting

34 C.F.R. § 300.13(b)(10)). The Court also noted that the Secretary of Education defined the term "medical services" as those "'services provided by a licensed physician.'" Id. (quoting 34 C.F.R. § 300.13(b)(4)).

The Court concluded that, when read together, these regulations required the school to provide services which could readily be performed by a school nurse while services performed by a physician were excluded. Id. The Court found that the Secretary's interpretation of the statutory language warranted deference, because it was reasonable to believe that Congress included the medical services exception in order to "spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." Id. In such a case, Tatro pointed out, "[c]hildren with serious medical needs are still entitled to an education. . .[since] the Act specifically includes instruction in hospitals and at home within the definition of 'special education.'" Id. at 892 n. 11 (citing 20 U.S.C. § 1401(16)). Because the catheterization could be provided by a school nurse or trained layman, however, the Court held that it was reasonable for the Secretary to conclude "that school nursing services are not the sort of burden that Congress intended to exclude as a 'medical service.'" Id. at 893.

Tatro is subject to several interpretations. It may be read as adopting a bright line rule that any medical service that can be performed by someone other than a licensed physician falls outside the scope of the exception and must be provided by the school. See, e.g., Macomb County Intermediate Sch. Dist. v. Joshua S., 715 F. Supp. 824, 828 (E.D. Mich. 1989). The majority of courts, however, have rejected such a per se rule. See, e.g., Granite Sch. Dist. v. Shannon, 787 F. Supp. 1020, 1027 (D. Utah 1992); Bevin H. ex rel. Michael H. v. Wright, 666 F. Supp. 71, 75 (W.D. Pa. 1987); Detsel ex rel. Detsel v. Board of Educ. of Auburn Enlarged City Sch. Dist., 637 F. Supp. 1022, 1026-27 (N.D.N.Y. 1986). In Shannon, the United States District Court for the District of Utah stated that it did not

> read Tatro to stand for the proposition that all health services performed by someone other than a licensed physician are related services under the Act regardless of the amount of care, expense, or burden on the school system and, ultimately, on other children.
>
> . . .
>
> . . .Rather, the Court held only that services which must be provided by a licensed physician, other than those which are diagnostic or evaluative, are excluded and that school nursing services of a simple nature are not excluded.

Shannon, 787 F. Supp. at 1027 (emphasis added). In the instant case, the district court found this rationale persuasive and refused to follow a per se rule. Instead, the court concluded that Tatro required it to measure the burden on the school district to provide the requested care and to require the school to provide the service if the burden was not excessive.

Rutherford County argues that the district court misapplied the Tatro rationale by engaging in a balancing of interests analysis after it had already determined that the requested care was a medical service. Defendant maintains that the only relevant inquiry is whether the service is medical in nature and, if that question is answered in the affirmative, it is inappropriate for a court to employ any further cost-benefit analysis.

The district court found the service in question to be "medical in nature." We believe the better interpretation of Tatro to be that a school district is not required to provide every service which is "medical in nature." The services at issue in Tatro could be provided by someone other than a nurse and a layperson, with minimum training, could provide it. Tatro, 468 U.S. at 894. It was, therefore, the kind of service that was not unduly expensive or beyond the range of the school system's competence. Id. at 892. We believe it is appropriate to take into account the risk involved and the liability factor of the school district inherent in providing a service of a medical nature such as is involved in this controversy.

IV. The Burden of Providing the Requested Service

Both parties agree that Tennessee law requires that the service requested by Samantha be administered by a physician, registered practical nurse, licensed practical nurse, respiratory care specialist, the patient's relatives or the patient herself. TENN. CODE. ANN. § 63-6-402, 63-6-410. Thus, the parties also agree that, unlike Tatro, Tennessee law would not allow a school nurse to administer the service in question unless the nurse or medical person possessed the requisite licensing and training. The district court estimated that the cost of hiring a licensed practical nurse was not much more than the cost of hiring a certified nurse's assistant. Thus, the district court found that the burden of providing the requested care was not excessive since Rutherford County had initially agreed to hire such an assistant, including upgrading such assistant to the requisite qualification level.

Rutherford County contends that the district court's finding is clearly erroneous. It notes that both the ALJ and the district court found that Samantha required almost constant care. A nurse or medical attendant would have had to devote virtually all of his or her attention to Samantha. Rutherford County contends that it is inherently burdensome to hire one medical professional to care for a single child, since the cost cannot be reasonable or feasibly distributed over the entire student population. Since Rutherford County originally intended for the nursing assistant in

question to assist many different children, defendant maintains that the district court mistakenly assumed that the added cost of providing Samantha the requested care was insubstantial.
Since we agree that the services requested by Samantha are inherently burdensome, we express no opinion about the financial cost of hiring a licensed practical nurse rather than a nursing assistant. The undue burden in this case derives from the nature of the care involved rather than the salary of the person performing it. We are not persuaded by Department of Education v. Katherine D. ex rel. Kevin & Roberta D., 727 F.2d 809, 815 (9th Cir. 1983), a case decided before Tatro. The Ninth Circuit held that the Act required a school district to pay for a handicap child's tracheostomy services, since a trained layperson or school nurse was capable of administering the care. Id. at 815 n. 6. In several decisions since Tatro, however, district courts have held that the Act does not require a school district to provide tracheostomy services, among others, when the handicapped student requires virtually constant care. E.g., Shannon, 787 F. Supp. at 1030; Wright, 666 F. Supp. at 75; Detsel ex rel. Detsel, 637 F. Supp. at 1026-27. In Shannon, the district court explained:

> Shannon's reliance on Tatro is misplaced. The differences between the level of care required in Tatro and the care required by Shannon are significant. The child in Tatro did not require constant monitoring. The CIC procedure, which the child would soon be able to perform herself, could be performed by a layperson a few times a day. In contrast, Shannon requires constant care to monitor and clear her tube. The parties have stipulated that the care of at least a licensed practical nurse is required.

Shannon, 787 F. Supp. at 1030. In Wright, the district court explained that

> [t]he services required are varied and intensive. They must be provided by a nurse, not a layperson. They are time-consuming and expensive. Above all, the life threatening prospect of a mucous plug demands the constant attention of the nurse. Because of this need for constant vigilance, a school nurse or any other qualified person with responsibility for other children within the school could not safely care for Bevin.
>
> It is the "private duty" aspect of Bevin's nursing services which distinguishes this case from. . .Tatro. . .and Katherine D. [which] all involved intermittent care which could be provided by the school district at relatively little expense in both time and money.

Wright, 666 F. Supp. at 75. Similarly, the district court in Detsel noted that

> [t]he Supreme Court considered the extent and the nature of the service performed in the Tatro decision. Unlike CIC, the services required by Melissa are extensive. This is not a simple procedure which the child may perform herself. Constant monitoring is required in order to protect Melissa's very life. The record indicates that the medical attention required by Melissa is beyond the competence of a school nurse.

Detsel ex rel. Detsel, 637 F. Supp. at 1026-27.

We find the reasoning of these decisions persuasive, especially Wright. As therein explained, it is the "private duty" component of Samantha's care that is inherently burdensome. In Katherine D., the child required suctioning of her tracheostomy two or three times a day and there was no hint that the child faced life threatening consequences in the event the routine care was not administered promptly. Similarly, the child in Tatro required catheterization every three or four hours and the Court did not suggest that the child might die if the school nurse was fifteen minutes late. Unlike this case, neither Tatro nor Katherine D. involved care of a constant nature or of life-threatening consequences to the student. The district court found that Samantha required almost exclusive medical supervision and that such care was necessary in order to protect Samantha's life. Requiring a school to hire a licensed practical nurse to care for one child is "inherently burdensome" and, undoubtedly, distinguishable from Tatro.

Samantha and her parents argue, however, that the district court was clearly erroneous when it concluded that Samantha required constant care and supervision. Samantha's father submitted an affidavit which indicated that, during the previous school year, he and his wife did not actually remain in the classroom with Samantha but waited in an adjacent room with a pager in the event Samantha required medical attention. The district court rejected this contention noting that:

> [a]lthough Samantha's father avers, in his supplemental affidavit, that it was not the plaintiffs' intention to request exclusive care for Samantha, the evidence presented at the hearing preponderates against any conclusion otherwise. While it is true that a nurse might be able to attend briefly to others in Samantha's room, there is no dispute that Samantha requires constant attention and often one-to-one care. The plaintiffs repeatedly point out in their briefs that Samantha's life-threatening condition requires that Samantha be the attendant's number one priority, and there is no evidence to the contrary.

We believe that the evidence adduced at the administrative hearing was more than sufficient to support the district court's finding.

Samantha's father testified that Samantha's breathing tube could be easily dislodged if she coughed, changed her clothing, or even played roughly with other children. He stated that, if the tube was not reinserted within fifteen or twenty minutes, Samantha's carbon dioxide level would rise and she would fall asleep. Once asleep, Samantha would cease breathing and die if respiratory functions were not restored within four or five minutes. Neely also explained that when Samantha had a cold she required suctioning approximately every twenty minutes. When asked how someone could tell when Samantha needed suctioning, he responded as follows:

> I suppose basically you could say you just listen. The sounds that we are listening for is not the same one that you might be. It's just something that you learn or are taught to listen for. Also, I mean, we can tell by her lip color, by her fingernails, just by the way she is acting.

As the district court properly noted, if a nurse attended to the needs of other children, there would be no one present to observe Samantha's behavior, lip and skin color or any of the other tell-tale signs that Samantha required immediate suctioning.

Since the district court did not give its finding of constant care sufficient weight in its determination that the requested care could be provided without undue burden on the school district, we conclude that it was in error. The care requested by Samantha falls within the "medical services" exclusion to the IDEA. Accordingly, we REVERSE the decision of the district court and AFFIRM the ALJ's holding for defendant.

Volume_Issue: 2304

Posting_Date: 19951130

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

APR 26 1995

OSEP- 95-16

OSEP MEMORANDUM

TO : Chief State School Officers

FROM : Judith E. Heumann
Assistant Secretary
Office of Special Education and
Rehabilitative Services

Judith E. Heumann

Thomas Hehir
Director
Office of Special Education Programs

SUBJECT: Questions and Answers on Disciplining Students with Disabilities

The purpose of this memorandum is to provide guidance about the current legal requirements of the Individuals with Disabilities Education Act (IDEA) for addressing misconduct of students with disabilities and to correct the misunderstanding that students with disabilities are exempt from discipline under current law. This memorandum also includes a discussion of the recent amendments made to IDEA by the Improving America's Schools Act and the recently enacted Gun-Free Schools Act as they apply to students with disabilities who bring firearms to school. If changes are made to current law in the reauthorization of the IDEA, further guidance will be issued to reflect them.

Two other Federal laws that are enforced by the Department's Office for Civil Rights (OCR)--Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act of 1990 (ADA), Title II--also govern school districts' obligations to provide educational services to disabled students. Unless otherwise noted, compliance with the IDEA requirements as set forth in this memorandum would satisfy the requirements of Section 504 and Title II of the ADA.

Public Law 94-142, the Education for All Handicapped Children's Act of 1975 [now Part B of IDEA] was enacted to address concerns that disabled students, particularly those whose disabilities had behavioral components, were excluded from any public education or were not provided an education appropriate to their unique learning needs. Thus, IDEA recognizes the right of each disabled student to a free appropriate public education (FAPE), which includes an array of rights and procedural protections for eligible students and their parents. One of the central tenets of IDEA is the requirement that each disabled student's program and placement must be individually designed to meet his or her unique learning needs. Today, as school safety takes on increasing importance for all of us, we want to underscore the compatibility of guaranteeing the rights of students with disabilities with the goal of school safety.

Clearly, school safety starts with the commitment of every student to take full responsibility for his or her own safety and the safety of others both in and out of school. This commitment to personal responsibility is essential to ensuring that the goal of safe schools is realized. For any student who misbehaves, a school should decide what action is most likely to correct the misconduct. For a disabled student, this decision may need to take into account the student's disability.

As we travel throughout the country, we have met with parents and school officials, who have underscored the importance of working cooperatively to address concerns when signs of misconduct by students with disabilities first appear before more drastic measures are considered. We also have visited schools that have implemented models for behavior management so effectively that, in many instances, the need for subsequent interventions has been greatly reduced, or even eliminated entirely. The Department encourages and supports the development and dissemination, at the local, State and national levels, of effective classroom and behavior management practices. We also believe that there are a number of positive steps that educators can take to address misconduct as soon as it appears to prevent the need for more drastic measures. For students whose disabilities have behavioral aspects, preventive measures, such as behavior management plans, should be considered and can be facilitated through the individualized education program (IEP) and placement processes required by IDEA. Teacher training initiatives in conflict management and behavior management strategies also should be considered as these strategies are implemented.

If the steps described above are not successful, the appropriate use of measures such as study carrels, time-outs, or other restrictions in privileges could also be considered, so long as they are not inconsistent with a student's IEP. In addition, a disabled student may be suspended from school for up to ten school days. No prior determination of whether the misconduct was a manifestation of the student's disability is required before any of the above measures can be implemented. If the misconduct is such that more drastic measures would be called for, educators should review the student's current educational program and placement and consider whether a change in placement would be an appropriate measure to address the misconduct.

Where educators believe that more drastic measures are called for, a disabled student may be removed from school for more than ten school days only if the following steps are taken. First, a group of persons knowledgeable about the student must determine whether the student's misconduct was a manifestation of his or her disability. If this group determines that the misconduct was not a manifestation of the student's disability, the student may be expelled or suspended from school for more than ten school days, provided applicable procedural safeguards are followed and educational services continue during the period of disciplinary removal.

However, if the group determines that the student's misconduct was a manifestation of his or her disability, the student may not be expelled or suspended from school for more than ten school days. Educators still can address the misconduct through appropriate instructional and/or related services, including conflict management and/or behavior management strategies, student and teacher training initiatives, measures such as study carrels, time-outs, or other restrictions in privileges, so long as they are not inconsistent with a student's IEP, and, as a last resort, through change of placement procedures in accordance with IDEA. Moreover, the school district has the option of seeking a court order at any time to remove the student from school or to change the student's placement if it believes that maintaining the student in the current educational placement is substantially likely to cause injury.

In addition, recent amendments to IDEA made by the Improving America's Schools Act permit educators to make immediate interim changes of placement for students with disabilities who bring firearms to school for up to 45 calendar days. If the student's parents request a due process hearing, the student must remain in the interim placement until the completion of all proceedings, unless the parents and school district can agree on another placement.

The questions and answers with this memorandum provide a description of the options outlined above in greater detail. We hope that this information will be helpful as we all strive to promote safe and effective schools. We urge you and your staff to review this information carefully and to disseminate it to interested individuals and organizations throughout your State. For easy reference a table of contents, setting forth all sixteen questions and their corresponding page numbers, immediately follows.

Further questions can be directed to the Office of Special Education Programs by contacting Ms. Rhonda Weiss at (202) 205-8824 or Dr. JoLeta Reynolds at (202) 205-5507.

Attachment

cc: State Directors of Special Education
RSA Regional Commissioners
Regional Resource Centers
Federal Resource Center
Special Interest Groups
Parent Training Centers
Independent Living Centers
Protection and Advocacy Agencies

TABLE OF CONTENTS

QUESTIONS AND ANSWERS ON DISCIPLINING STUDENTS WITH DISABILITIES

Question		Page
1	Under IDEA, what steps should school districts take to address misconduct when it first appears?	7
2	Are there additional measures that educators may use in addressing misconduct of students with disabilities, and if so, under what circumstances may such measures be used?	7
3	Is a series of short-term suspensions considered a change in placement?	8
4	Are there specific actions that a school district is required to take during a suspension of ten school days or less?	8
5	Under what circumstances may a school district seek to obtain a court order to remove a student with a disability from school or otherwise change the student's placement?	9
6	What is the first step that school districts must take before considering whether a student with a disability may be expelled or suspended from school for more than ten school days?	9
7	If an appropriate group determines that a student's misconduct was not a manifestation of his or her disability, what is the next step that school districts must take before expelling or suspending the student from school for more than ten school days?	10
8	Under IDEA, where a student is suspended for more than ten school days or expelled for misconduct that was not a manifestation of his or her disability, does the school have any continuing obligations to the student?	11

9 Under Section 504 and Title II of the ADA, where a student is expelled or suspended for more than ten school days for misconduct that was not a manifestation of his or her disability, does the school have any continuing obligations to the student? 12

10 What options are available to school districts in addressing the misconduct of students with disabilities whose misconduct was a manifestation of his or her disability? 13

11 Are there any special provisions of IDEA that are applicable to students with disabilities who bring firearms to school? 13

12 Under the provision described in question 11 above, how long can a student be placed in an interim alternative educational setting? 14

13 Does the Gun-Free Schools Act apply to students with disabilities? 15

14 How can school districts implement policies under the Gun-Free Schools Act in a manner that is consistent with the requirements of IDEA and Section 504? 15

15 Does the authority of the school district's chief administering officer, under the Gun-Free Schools Act, to modify the expulsion requirement on a case-by-case basis mean that the decision regarding whether the student's bringing a firearm to school was a manifestation of the student's disability and placement decisions can be made by the chief administering officer? 16

16 What immediate steps can school districts take to remove a student with a disability who brings a firearm to school? 16

QUESTIONS AND ANSWERS
ON DISCIPLINING STUDENTS WITH DISABILITIES

Question 1: Under IDEA, what steps should school districts take to address misconduct when it first appears?

ANSWER

School districts should take prompt steps to address misconduct when it first appears. Such steps could, in many instances, eliminate the need to take more drastic measures. These measures could be facilitated through the individualized education program (IEP) and placement processes required by IDEA. For example, when misconduct appears, determinations could be made as to whether the student's current program is appropriate and whether the student could benefit from the provision of more specialized instructional and/or related services, such as counseling and psychological services or social-work services in schools. In addition, training of the teacher in effective use of conflict management and/or behavior management strategies also could be extremely effective. In-service training for all personnel who work with the student, and when appropriate, other students, also can be essential in ensuring the successful implementation of the above interventions.

Question 2: Are there additional measures that educators may use in addressing misconduct of students with disabilities, and if so, under what circumstances may such measures be used?

ANSWER

The use of measures such as study carrels, time-outs, or other restrictions in privileges is permissible so long as such measures are not inconsistent with a student's IEP. While there is no requirement that such measures be specified in a student's IEP, IEP teams could determine that it would be appropriate to address their use in individual situations. Another possibility is an in-school change in a student's current educational program or placement, or even a removal of a student with a disability from school.

Where these changes are long-term (more than ten school days), they are considered a change in placement. IDEA requires that parents be given written notice before a change in placement can be implemented. (See question 7). However, where in-school discipline or short-term suspension (ten school days or less) is involved, this would not be considered a change in placement, and

IDEA's parent-notification provisions would not apply. Also, there is no requirement for a prior determination of whether the student's misconduct was a manifestation of the student's disability. (See question 6).

Question 3: Is a series of short-term suspensions considered a change in placement?

ANSWER

A series of short-term suspensions in the same school year could constitute a change in placement. Factors such as the length of each suspension, the total amount of time that the student is excluded from school, the proximity of the suspensions to each other, should be considered in determining whether the student has been excluded from school to such an extent that there has been a change in placement. This determination must be made on a case-by-case basis.

Question 4: Are there specific actions that a school district is required to take during a suspension of ten school days or less?

ANSWER

There are no specific actions under Federal law that school districts are required to take during this time period. If the school district believes that further action to address the misconduct and prevent future misconduct is warranted, it is advisable to use the period of suspension for preparatory steps. For example, school officials may convene a meeting to initiate review of the student's current IEP to determine whether implementation of a behavior management plan would be appropriate. If long-term disciplinary measures are being considered, this time also could be used to convene an appropriate group to determine whether the misconduct was a manifestation of the student's disability.

If the student's IEP or placement needs to be revised, the school district should propose the modification. If the student's parents request a due process hearing on the proposal to change the student's IEP or placement, the school district may seek to persuade the parents to agree to an interim placement for the student while due process proceedings are pending. If the school district and parents cannot agree on an interim placement for the student while the due process hearing is pending, and the school district believes that maintaining the student in the current educational placement is substantially likely to result in injury to the student or to others, the school district could seek a court order to remove the student from school. (See question 5).

Question 5: Under what circumstances may a school district seek to obtain a court order to remove a student with a disability from school or otherwise change the student's placement?

ANSWER

A school district may seek a court order at any time to remove any student with a disability from school or to change the student's current educational placement if the school district believes that maintaining the student in the current educational placement is substantially likely to result in injury to the student or to others.[1] Prior to reaching the point where there is a need to seek a court order, a school district should make every effort to reduce the risk that the student will cause injury. Efforts to minimize the risk of injury should, if appropriate, include the training of teachers and other affected personnel, the use of behavior intervention strategies and the provision of appropriate special education and related services.[2] In a judicial proceeding to secure a court order, the burden is on the school district to demonstrate to the court that such a removal or change in placement should occur to avoid injury.

Question 6: What is the first step that school districts must take before considering whether a student with a disability may be expelled or suspended from school for more than ten school days?

ANSWER

The first step is for the school district to determine whether the student's misconduct was a manifestation of the student's disability. This determination must be made by a group of persons knowledgeable about the student, and may not be made unilaterally by one individual. See, 34 CFR §300.533(a)(3) (composition of the placement team); 34 CFR §300.344(a)(1)-(5) (participants on the IEP team). If the group determines that the student's misconduct was not a manifestation of his or her disability, the school district may expel or suspend the student from school for more than ten school days, subject to the conditions described below. If an appropriate group of persons determines that the student's misconduct was a manifestation of his or her disability, the student may not be expelled or suspended from school for more than ten school days for the misconduct. However, educators may use other procedures to address the student's misconduct, as described in question 10 below.

---

[1] Honig v. Doe, 108 S.Ct. at 606.

[2] See Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223 (8th Cir. 1994), where the Court of Appeals for the Eighth Circuit (Arkansas, Iowa, Missouri, Minnesota, Nebraska, North Dakota, and South Dakota), held that in addition to showing that a student is substantially likely to cause injury, the school district must show that it has made reasonable efforts to accommodate the student's disabilities so as to minimize the likelihood that the student will injure him or herself or others.

Question 7: If an appropriate group determines that a student's misconduct was not a manifestation of his or her disability, what is the next step that school districts must take before expelling or suspending the student from school for more than ten school days?

ANSWER

A long-term suspension or expulsion is a change in placement. Before any change in placement can be implemented, the school district must give the student's parents written notice a reasonable time before the proposed change in placement takes effect.[3] This written notice to parents must include, among other matters, the determination that the student's misconduct was not a manifestation of the student's disability and the basis for that determination, and an explanation of applicable procedural safeguards, including the right of the student's parents to initiate an impartial due process hearing to challenge the manifestation determination and to seek administrative or judicial review of an adverse decision.

If the student's parents initiate an impartial due process hearing in connection with a proposed disciplinary exclusion or other change in placement, and the misconduct does not involve the bringing of a firearm to school (see question 11), the "pendency" provision of IDEA requires that the student must remain in his or her current educational placement until the completion of all proceedings.[4] If the parents and school district can agree on an interim placement, as is frequently the case, the student would be entitled to remain in that placement until the completion of all proceedings. During authorized review proceedings, school districts may use measures, in accordance with question 2 above, to address the misconduct.

---

[3] 34 CFR §§300.504(a) and 300.505 (requirements for prior written notice to parents and content of notice).

[4] For a student not previously identified by the school district as a student potentially in need of special education, a parental request for evaluation or a request for a due process hearing or other appeal after a disciplinary suspension or expulsion has commenced does not obligate the school district to reinstitute the student's prior in-school status. This is

Question 8: Under IDEA, where a student is suspended for more than ten school days or expelled for misconduct that was not a manifestation of his or her disability, does the school have any continuing obligations to the student?

ANSWER

Under IDEA, as a condition for receipt of funds, States must ensure that a free appropriate public education (FAPE) is made available to all eligible children with disabilities in mandated age ranges. Therefore, in order to meet the FAPE requirements of IDEA, educational services must continue for students with disabilities who are excluded for misconduct that was not a manifestation of their disability during periods of disciplinary removal that exceed ten school days. Thus, a State that receives IDEA funds must continue educational services for these students. However, IDEA does not specify the particular setting in which continued educational services must be provided to these students. During the period of disciplinary exclusion from school, each disabled student must continue to be offered a program of appropriate educational services that is individually designed to meet his or her unique learning needs. Such services may be provided in the home, in an alternative school, or in another setting.

---

because in accordance with the "stay-put" provision of IDEA, the student's "then current placement" is the out-of-school placement. After the disciplinary sanction is completed, if the resolution of the due process hearing is still pending, the student must be returned to school as would a nondisabled student in similar circumstances. It should be noted that, pending the resolution of the due process hearing or other appeal, a court could enjoin the suspension or expulsion and direct the school district to reinstate the student if the court determines that the school district knew or reasonably should have known that the student is a student in need of special education.

Question 9: Under Section 504 and Title II of the ADA, where a student is expelled or suspended for more than ten school days for misconduct that was not a manifestation of his or her disability, does the school have any continuing obligations to the student?

ANSWER

Two related Federal laws, which are enforced by the Department's Office for Civil Rights (OCR), also contain requirements relating to disabled students in public elementary or secondary education programs. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits discrimination on the basis of disability by recipients of Federal financial assistance, including IDEA funds. The Section 504 regulation at 34 CFR Part 104, §§104.33-104.36, contains free appropriate public education requirements that are similar to the IDEA FAPE requirements. The Americans with Disabilities Act of 1990 (ADA), Title II, extends Section 504's prohibition of discrimination on the basis of disability to all activities of State and local governments, whether or not they receive Federal funds. This includes all public school districts. The Department interprets the requirements of Title II of the ADA as consistent with those of Section 504. Throughout the remainder of this document, references to Section 504 also encompass Title II of the ADA.

As is the case under IDEA, under Section 504, students with identified disabilities may be expelled or suspended from school for more than ten school days only for misconduct that was not a manifestation of the student's disability. However, the Department has interpreted the nondiscrimination provisions of Section 504 to permit school districts to cease educational services during periods of disciplinary exclusion from school that exceed ten school days if nondisabled students in similar circumstances do not continue to receive educational services.

In implementing their student-discipline policies, school districts must comply with the requirements of IDEA and Section 504. Further questions about the application of the requirements of Section 504 and Title II of the ADA should be directed to your OCR regional office.

Question 10: What options are available to school districts in addressing the misconduct of students with disabilities whose misconduct was a manifestation of his or her disability?

ANSWER

If a group of persons knowledgeable about the student determines that the student's misconduct was a manifestation of his or her disability, the student may not be expelled or suspended from school for more than ten school days. However, it is recommended that school officials review the student's current educational placement to determine whether the student is receiving appropriate instructional and related services in the current placement and whether conflict management and or behavior management strategies should be implemented for the student as well as for teachers and all personnel who work with the student, and for other students if appropriate. A change in placement, if determined appropriate, could be implemented subject to applicable procedural safeguards (see question 7). For example, the school district could propose to place the student in another class in the same school or in an alternative setting, in light of the student's particular learning needs.

The school district also would have the option of suspending the student from school for ten school days or less. The school district also has the option of seeking a court order at any time to remove the student from school or to change the student's placement if it believes that maintaining the student in the current placement is substantially likely to result in injury to the student or to others. (See question 5).

Question 11: Are there any special provisions of IDEA that are applicable to students with disabilities who bring firearms to school?

ANSWER

Recent amendments to IDEA made by the Improving America's Schools Act give school authorities additional flexibility in protecting the safety of other students when any student with a disability has brought a firearm[5] to a school under a local school district's jurisdiction. These amendments to IDEA took effect as of October 20, 1994.

---

[5] This amendment to IDEA uses the term "weapon" and states that "weapon" means a firearm as such term is defined in section 921(a)(3) of Title 18, United States Code. The Gun-Free Schools Act also uses the term "weapon."

Even before determining whether the behavior of bringing a firearm to school was a manifestation of the student's disability, the school district may place the student in an interim alternative educational setting, in accordance with State law, for up to 45 calendar days. The interim alternative educational setting must be decided by the participants on the student's IEP team described at 34 CFR §§300.344(a)(1)-(a)(5), which include the student's teacher, an agency representative who is qualified to provide or supervise the provision of special education, the student's parents, and the student, if appropriate. However, the student's placement cannot be changed until the IEP team has been convened and determined the interim alternative educational placement that the team believes would be appropriate for the student.[6] If the parents disagree with the alternative educational placement or the placement that the school district proposes to follow the alternative placement and the parents initiate a due process hearing, then the student must remain in the alternative educational setting during authorized review proceedings, unless the parents and the school district can agree on another placement.

Question 12: Under the provision described in question 11 above, how long can a student be placed in an interim alternative educational setting?

ANSWER

A student with a disability who has brought a firearm to a school under a local school district's jurisdiction may be placed in an interim alternative educational setting, in accordance with State law, for up to 45 calendar days. However, if the student's parents initiate a due process hearing and if the parties cannot agree on another placement, the student must remain in that interim placement during authorized review proceedings. In this situation, the student could remain in the interim alternative educational setting for more than 45 calendar days.

---

[6] Under IDEA, a student with a disability who has brought a firearm to school may be removed from school or subjected to in-school discipline that removes the student from the current placement for ten school days or less. Therefore, before the student is placed in the interim alternative educational setting in accordance with the IEP team's decision, the school district has the option of removing the student from school, using other in-school discipline, or placing the student in an alternative setting for ten school days or less. (See questions 2 and 3).

Question 13: Does the Gun-Free Schools Act apply to students with disabilities?

ANSWER

The Gun-Free Schools Act applies to students with disabilities. The Act must be implemented consistent with IDEA and Section 504. The Gun-Free Schools Act states, among other requirements, that each State receiving Federal funds under the Elementary and Secondary Education Act shall have in effect a State law requiring local educational agencies to expel from school for not less than one year a student who brings a firearm to school under the jurisdiction of local educational agencies in that State, except that the State law must allow the local educational agency's chief administering officer to modify the expulsion requirement for a student on a case-by-case basis. The Gun-Free Schools Act explicitly states that the Act must be construed in a manner consistent with the IDEA.

Question 14: How can school districts implement policies under the Gun-Free Schools Act in a manner that is consistent with the requirements of IDEA and Section 504?

ANSWER

Compliance with the Gun-Free Schools Act can be achieved consistent with the requirements that apply to students with disabilities as long as discipline of such students is determined on a case-by-case basis in accordance with IDEA and Section 504. Under the provision that permits modification of the expulsion requirement on a case-by-case basis, the requirements of IDEA and Section 504 can be met. IDEA and Section 504 require a determination by a group of persons knowledgeable about the student on whether the bringing of the firearm to school was a manifestation of the student's disability. Under IDEA and Section 504, a student with a disability may be expelled only if this group of persons determines that the bringing of a firearm to school was not a manifestation of the student's disability, and after applicable procedural safeguards have been followed.

For students with disabilities eligible under IDEA who are expelled in accordance with these conditions, educational services must continue during the expulsion period. The Gun-Free Schools Act also states that nothing in that Act shall be construed to prevent a State from allowing a school district that has expelled a student from such a student's regular school setting from providing educational services to that student in an alternative educational setting. For students with disabilities who are not eligible for services under IDEA, but who are covered by Section 504 and are expelled in accordance with the above conditions, educational services may be discontinued during the expulsion period if nondisabled students in similar circumstances do not receive continued educational services.

Question 15: Does the authority of the school district's chief administering officer, under the Gun-Free Schools Act, to modify the expulsion requirement on a case-by-case basis mean that the decision regarding whether the student's bringing a firearm to school was a manifestation of the student's disability and placement decisions can be made by the chief administering officer?

ANSWER

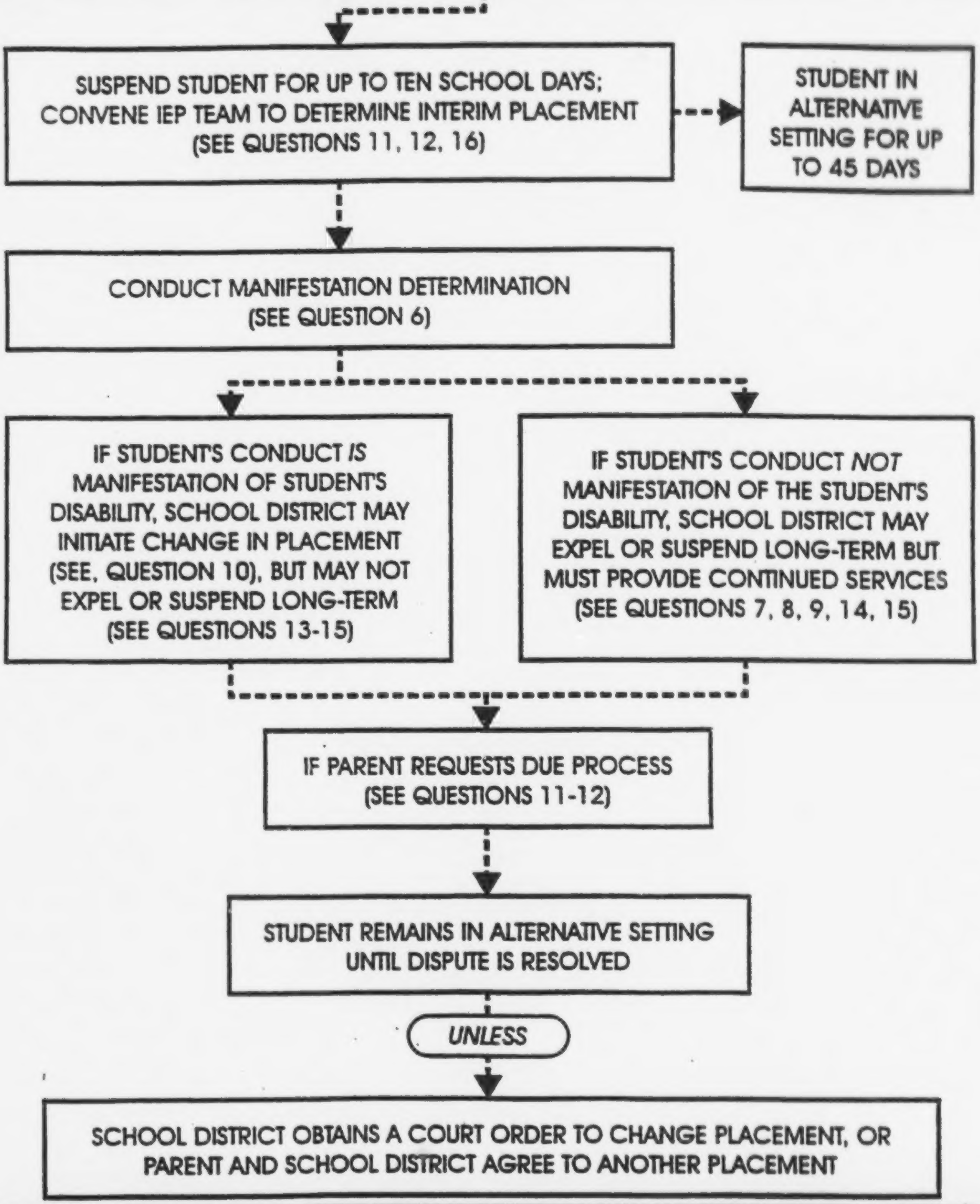
No. As discussed above, all of the procedural safeguards and other protections of IDEA and Section 504 must be followed. Once it is determined by an appropriate group of persons that the student's bringing a firearm to school was not a manifestation of the student's disability, the school district's chief administering officer may exercise his or her decision-making authority under the Gun-Free Schools Act in the same manner as with nondisabled students in similar circumstances. However, for students with disabilities who are eligible under IDEA and who are subject to the expulsion provision of the Gun-Free Schools Act, educational services must continue during the expulsion period. By contrast, if it is determined that the student's behavior of bringing a firearm to school was a manifestation of the student's disability, the chief administering officer must exercise his or her authority under the Gun-Free Schools Act to determine that the student may not be expelled for the behavior. However, there are immediate steps that may be taken, including removal. (See question 16).

Question 16: What immediate steps can school districts take to remove a student with a disability who brings a firearm to school?

ANSWER

A student with a disability who brings a firearm to school may be removed from school for ten school days or less, and placed in an interim alternative educational setting for up to 45 calendar days. (See questions 2 and 11). However, if the parents initiate due process, the student must remain in the interim alternative placement during authorized review proceedings, unless the parents and school district can agree on a different placement. (See questions 11 and 12). In addition, school districts may initiate change in placement procedures for such a student, subject to the parents' right to due process. A school district also could seek a court order if the school district believes that the student's continued presence in the classroom is substantially likely to result in injury to the student or to others. (See question 5).

STUDENT WITH DISABILITIES *BRINGS* A FIREARM TO SCHOOL



SUSPEND STUDENT FOR UP TO TEN SCHOOL DAYS; CONVENE IEP TEAM TO DETERMINE INTERIM PLACEMENT (SEE QUESTIONS 11, 12, 16)

STUDENT IN ALTERNATIVE SETTING FOR UP TO 45 DAYS

CONDUCT MANIFESTATION DETERMINATION (SEE QUESTION 6)

IF STUDENT'S CONDUCT *IS* MANIFESTATION OF STUDENT'S DISABILITY, SCHOOL DISTRICT MAY INITIATE CHANGE IN PLACEMENT (SEE, QUESTION 10), BUT MAY NOT EXPEL OR SUSPEND LONG-TERM (SEE QUESTIONS 13-15)

IF STUDENT'S CONDUCT *NOT* MANIFESTATION OF THE STUDENT'S DISABILITY, SCHOOL DISTRICT MAY EXPEL OR SUSPEND LONG-TERM BUT MUST PROVIDE CONTINUED SERVICES (SEE QUESTIONS 7, 8, 9, 14, 15)

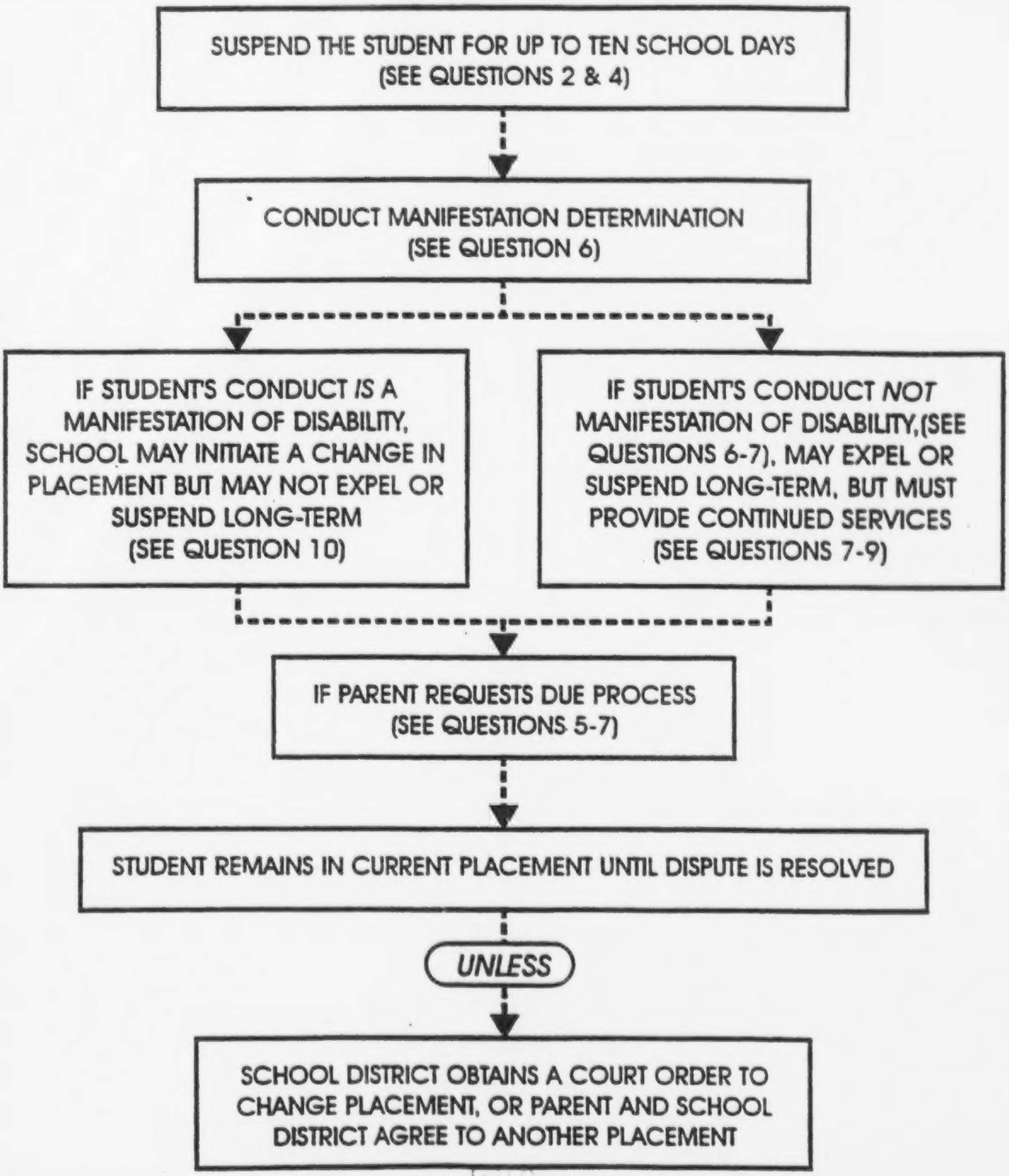
IF PARENT REQUESTS DUE PROCESS (SEE QUESTIONS 11-12)

STUDENT REMAINS IN ALTERNATIVE SETTING UNTIL DISPUTE IS RESOLVED

UNLESS

SCHOOL DISTRICT OBTAINS A COURT ORDER TO CHANGE PLACEMENT, OR PARENT AND SCHOOL DISTRICT AGREE TO ANOTHER PLACEMENT

STUDENT WITH DISABILITIES
ENGAGES IN BEHAVIOR SUBJECT TO DISCIPLINE
(BUT DOES *NOT* BRING A FIREARM TO SCHOOL)



SUSPEND THE STUDENT FOR UP TO TEN SCHOOL DAYS (SEE QUESTIONS 2 & 4)

CONDUCT MANIFESTATION DETERMINATION (SEE QUESTION 6)

IF STUDENT'S CONDUCT *IS* A MANIFESTATION OF DISABILITY, SCHOOL MAY INITIATE A CHANGE IN PLACEMENT BUT MAY NOT EXPEL OR SUSPEND LONG-TERM (SEE QUESTION 10)

IF STUDENT'S CONDUCT *NOT* MANIFESTATION OF DISABILITY,(SEE QUESTIONS 6-7), MAY EXPEL OR SUSPEND LONG-TERM, BUT MUST PROVIDE CONTINUED SERVICES (SEE QUESTIONS 7-9)

IF PARENT REQUESTS DUE PROCESS (SEE QUESTIONS 5-7)

STUDENT REMAINS IN CURRENT PLACEMENT UNTIL DISPUTE IS RESOLVED

UNLESS

SCHOOL DISTRICT OBTAINS A COURT ORDER TO CHANGE PLACEMENT, OR PARENT AND SCHOOL DISTRICT AGREE TO ANOTHER PLACEMENT

20 IDELR 812
4 F.3d 1398

Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. by Holland

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, BOARD OF
EDUCATION, Plaintiff-Appellant
v.
RACHEL H., by and through her guardian ad litem, Robert
HOLLAND; William HONIG, California State Superintendent of
Public Instruction; CALIFORNIA
STATE DEPARTMENT OF EDUCATION HEARING OFFICE, MCGEORGE SCHOOL OF
LAW; and Mary COTE, Hearing Officer,

Defendants-Appellees

No. 92-15608

U.S. Court of Appeals, Ninth Circuit

JANUARY 24 1994

* Placement, Mental Retardation

* Least Restrictive Environment (LRE), Mental Retardation

* Mental Retardation, Placement

* Placement, Factors Considered in Placement Change

Summary

Parents of an 11-year-old child who was moderately retarded requested that their child receive a full-time placement in a regular education classroom for the 1989-1990 school year. The school district refused their request. In the alternative, the school district offered to place the child in a special education class for academic subjects and in a regular education class for non-academic activities such as art, music, lunch, and recess. The parents enrolled the child in a regular education class at a private school and appealed the school district's decision to a hearing officer. The hearing officer determined that the school district's efforts to educate the child in a regular classroom had been inadequate and ordered the district to place the child in a regular classroom with support services, including a special education consultant and a part-time aide. The school district appealed to the district court, which affirmed the decision of the hearing officer and agreed that the appropriate placement for the child was a full-time regular second grade classroom with some supplemental services. The district appealed.

HELD: for the parents.

The circuit court concluded that the balancing test applied by the district court for determining the school district's compliance with 20 USC 1412(5)(B), the provision of the IDEA which establishes a preference for educating children with disabilities in regular classrooms to the maximum extent possible, directly addressed the issue of an appropriate placement for the child in accordance with this statute. Therefore, the circuit court approved of and adopted the district court's test in its own review. The district court's test considered factors found in both the Daniel R.R. and Roncker line of cases. These factors included the educational benefits of placing the child in a full-time regular education program, the non-academic benefits of such a placement, the effect that the child would have on the teacher and other students in the regular classroom, and the costs associated with this placement.

On appeal, the school district opposed the district court's findings that the child was benefiting both academically and non-academically in a regular classroom environment and that the child did not have a detrimental effect on the teacher or other students. The circuit court determined that the district court undertook a complete evidentiary hearing and found the parents' evidence regarding these factors to be more convincing than the district's evidence, and it did not disturb these findings on appeal. The school district also claimed that it would lose up to $190,764 in state special education funding if the child were not enrolled in a special education class at least 51% of the day. The circuit court found the school district unconvincing on the issue of cost as well, and pointed out that the district had not sought a waiver pursuant to the state education code. Finally, the circuit court rejected the school district's argument that the child must receive her academic and functional curriculum in special education from a specially credentialed teacher, since this proposition conflicted with 20 USC 1412(5)(B). Accordingly, the circuit court affirmed the judgment of the district court. The court went on to state that it could not determine the appropriate placement for the child at the present time, and held that the present and future placements for the child should be based on the principles set forth in both its own opinion and the opinion of the district court.

Counsel for Plaintiff-Appellant: Jane E. Slenkovich, Phoebe G. Graubard, Saratoga, California.
Counsel for Defendants-Appellees: Diane J. Lipton, Disability Rights Education & Defense Fund, Inc., Berkeley, California; Barry A. Zolotar, Deputy General Counsel, California Department of Education, Sacramento, California.

Counsel for the Amicus: Michael Jay Singer, Jeffrica Jenkins Lee, Attorneys, Appellate Staff, Civil Division, Department of Justice, Washington, D.C.

Joseph T. Sneed, Cecil F. Poole, and Stephen S. Trott, Circuit Judges.

SNEED, Circuit Judge.

Appeal from the United States District Court for the Eastern District of California. Prior ruling reported at: 18 IDELR 761

Opinion

The Sacramento Unified School District ("the District") timely appeals the district court's judgment in favor of Rachel Holland ("Rachel") and the California State Department of Education. The court found that the appropriate placement for Rachel under the Individuals with Disabilities Act ("IDEA") was full-time in a regular second grade classroom with some supplemental services. The District contends that the appropriate placement for Rachel is half-time in special education classes and half-time in a regular class. We affirm the judgment of the district court.

I.

Facts and Prior Proceedings[1]

Rachel Holland is now 11 years old and is moderately mentally retarded. She was tested with an I.Q. of 44. She attended a variety of special education programs in the District from 1985-89. Her parents sought to increase the time Rachel spent in a regular classroom, and in the fall of 1989, they requested that Rachel be placed full-time in a regular classroom for the 1989-90 school year. The District rejected their request and proposed a placement that would have divided Rachel's time between a special education class for academic subjects and a regular class for non-academic activities such as art, music, lunch, and recess. The district court found that this plan would have required moving Rachel at least 6 times each day between the two classrooms. Holland, 786 F. Supp. at 876. The Hollands instead enrolled Rachel in a regular kindergarten class at the Shalom School, a private school. Rachel remained at the Shalom School in regular classes and at the time the district court rendered its opinion, was in the second grade.

The Hollands and the District were able to agree on an Individualized Education Program ("IEP")[2] for Rachel. Although the IEP is required to be reviewed annually, see 20 U.S.C. § 1401(20)(B), because of the dispute between the parties, Rachel's IEP has not been reviewed since January 1990.[3]

The Hollands appealed the District's placement decision to a state hearing officer pursuant to 20 U.S.C. § 1415(b)(2). They maintained that Rachel best learned social and academic skills in a regular classroom and would not benefit from being in a special education class. The District contended Rachel was too severely disabled to benefit from full-time placement in a regular class. The hearing officer concluded that the District had failed to make an adequate effort to educate Rachel in a regular class pursuant to the IDEA. The officer found that (1) Rachel had benefited from her regular kindergarten class---that she was motivated to learn and learned by imitation and modeling; (2) Rachel was not disruptive in a regular classroom; and (3) the District had overstated the cost of putting Rachel in regular education---that the cost would not be so great that it weighed against placing her in a regular classroom. The hearing officer ordered the District to place Rachel in a regular classroom with support services, including a special education consultant and a part-time aide.

The District appealed this determination to the district court. Pursuant to 20 U.S.C. § 1415(e)(2), the parties presented additional evidence at an evidentiary hearing. The court affirmed the decision of the hearing officer that Rachel should be placed full-time in a regular classroom.

In considering whether the District proposed an appropriate placement for Rachel, the district court examined the following factors: (1) the educational benefits available to Rachel in a regular classroom, supplemented with appropriate aids and services, as compared with the educational benefits of a special education classroom; (2) the non-academic benefits of interaction with children who were not disabled; (3) the effect of Rachel's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming Rachel in a regular classroom.

1. Educational Benefits

The district court found the first factor, educational benefits to Rachel, weighed in favor of placing her in a regular classroom. Each side presented expert testimony which is summarized in the margin.[4] The court noted that the District's evidence focused on Rachel's limitations, but did not establish that the educational opportunities available through special education were better or equal to those available in a regular classroom. Moreover, the court found that the testimony of the Hollands' experts was more credible because they had more background in evaluating children with disabilities placed in regular classrooms, and they had a greater opportunity to observe Rachel over an extended period of time in normal circumstances. The district court also gave great weight to the testimony of Rachel's current teacher, Nina Crone, who the court found to be an experienced, skillful teacher. Ms. Crone stated that Rachel was a full member of the class and participated in all activities. Ms. Crone testified that Rachel was making progress on her IEP goals---that Rachel was learning one-to-one correspondence in counting, could recited the English and Hebrew alphabets, and that her communication abilities and sentence lengths were also improving.

The district court found that Rachel received substantial benefits in regular education and that all of her IEP goals could be implemented in a regular classroom with some modification to the curriculum and with the assistance of a part-time aide.

2. Non-academic Benefits

The district court next found that the second factor, nonacademic benefits to Rachel, also weighed in favor of placing her in a regular classroom. The court noted that the Hollands' evidence indicated that Rachel had developed her social and communications skills as well as her self-confidence from placement in a regular class, while the District's evidence tended to show that Rachel was not learning from exposure to other children and that she was isolated from her classmates. The court concluded that the differing evaluations in large part reflected the predisposition of the evaluators. The court found the testimony of Rachel's mother and her current teacher to be the most credible. These witnesses testified regarding Rachel's excitement about school, learning, and her new friendships, and Rachel's improved self-confidence.

3. Effect on the Teacher and Children in the Regular Class

The district court next addressed the issue of whether Rachel had a detrimental effect on others in her regular classroom. The court looked at two aspects, (1) whether there was detriment because the child was disruptive, distracting or unruly, and (2) whether the child would take up so much of the teacher's time that the other students would suffer from lack of attention. The witnesses of both parties agreed that Rachel followed directions, was well-behaved and not a distraction in class. The court found the most germane evidence on the second aspect came from Rachel's second grade teacher, Nina Crone, who testified that Rachel did not interfere with her ability to teach the other children and in the future would require only a part-time aide. Accordingly, the district court determined that the third factor weighed in favor of placing Rachel in a regular classroom.

4. Cost

Finally, the district court found that the District had not offered any persuasive or credible evidence to support its claim that educating Rachel in a regular classroom with appropriate services would be significantly more expensive than educating her in the District's proposed setting.

The District contended that it would cost $109,000 to educate Rachel full-time in a regular classroom. This figure was based on a full-time aide for Rachel and an estimate that it would cost over $80,000 to provide school-wide sensitivity training. The court found that the District did not establish that such training was necessary, and if it was, the court noted that there was evidence from the California Department of Education that the training could be had at no cost. Moreover, the court found it would be inappropriate to assign the total cost of the training to Rachel when other children with disabilities would benefit. In addition, the court concluded that the evidence did not suggest that Rachel required a full-time aide.

In addition, the court found that the comparison should have been between, on the one hand, the cost of placing Rachel in a special class with a full-time special education teacher and two full-time aides with approximately 11 other children, and, on the other hand, the cost of placing her in a regular class with a part-time aide. It noted, however, that the District had provided no evidence of this cost comparison.

The court also was not persuaded by the District's argument that it would lose significant funding if Rachel did not spend at least 51% of her time in a special education class. The court noted that a witness from the California Department of Education testified that waivers were available if a school district sought to adopt a program that did not fit neatly within the funding guidelines. The District had not applied for a waiver, however.

Thus, by inflating the cost estimates and failing to address the true comparison, the District did not meet its burden of proving that regular placement would burden the District's funds or adversely affect services available to other children. Therefore, the court found that the cost factor did not weigh against mainstreaming Rachel.

The district court concluded that the appropriate placement for Rachel was full-time in a regular second grade classroom with some supplemental services and affirmed the decision of the hearing officer.

II.
Jurisdiction

The district court had jurisdiction pursuant to 20 U.S.C. § 1415(e)(2). We have jurisdiction pursuant to 28 U.S.C. § 1291.

III.
Standards of Review

The appropriateness of a special education placement under the IDEA is reviewed de novo. W.G. v. Bd. of Trustees, 960 F.2d 1479, 1483 (9th Cir. 1992); Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1314 (9th Cir. 1987). The district court's findings of fact are reviewed for clear error. Ash v. Lake Oswego Sch. Dist., 980 F.2d 585, 588 (9th Cir. 1992); W.G. v. Bd., 960 F.2d at 1483. The clearly erroneous standard applies to the district court's factual determinations regarding (1) whether Rachel was receiving academic and nonacademic benefits in the regular classroom; (2) whether her presence was a detriment to others in the classroom; and (3) whether the District demonstrated that the cost of placing her in a regular classroom would be significantly more expensive. See Ash, 980 F.2d at 588 (district court's factual determination that student was incapable of deriving educational benefit outside of residential placement is reviewed for clear error); see also Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989) (whether education in the regular classroom with supplemental aids and services, can be achieved satisfactorily is an "individualized, fact specific inquiry").

IV.

Discussion

A. Mootness

It had been over a year since the district court rendered its decision. The court concluded that the appropriate placement at that time was full-time in a regular classroom. It noted that Rachel and the educational demands on her may change, and the IDEA had foreseen such changes in providing for an annual IEP review.

This Court cannot determine what would be the appropriate placement for Rachel at the present time. However, we conclude that this case presents a live controversy, because the conduct giving rise to the suit is capable of repetition, yet evading review. See Honig v. Doe, 484 U.S. 305, 318 (1988); Daniel R.R., 874 F.2d at 1040. As the district court noted, the District and the Hollands have conflicting educational philosophies and perceptions of the District's mainstreaming obligation. The District had consistently taken the view that a child with Rachel's I.Q. is too severely disabled to benefit from full-time placement in a regular class, while the Hollands maintain that Rachel learns both social and academic skills in a regular class and would not benefit from being in a special education class. This conflict is a continuing one and will arise frequently. See Holland, 786 F. Supp. at 877 n.4. Moreover, it is likely to evade review since the nine-month school year will not provide enough time for judicial review. See Board of Educ. v. Rowley, 458 U.S. 176, 186-87 n.9 (1982); Daniel R.R., 874 F.2d at 1041.

B. Mainstreaming Requirements of the IDEA

1. The Statute

The IDEA provides that each state must establish:

> [P]rocedures to assure that, to the maximum extent appropriate, children with disabilities. . .are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.. . .

20 U.S.C. § 1412(5)(B).

This provision sets forth Congress's preference for educating children with disabilities in regular classrooms with their peers. Department of Educ. v. Katherine D., 727 F.2d 809, 817 (9th Cir. 1983), cert. denied, 471 U.S. 1117 (1985); see also Oberti v. Bd. of Educ., No. 92-5462, slip. op. at 17 (3d Cir. May 28, 1993) (as corrected, Jun. 23, 1993); Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991), withdrawn, 956 F.2d 1025 (1992), reinstated, 967 F.2d 470 (1992); Daniel R.R., 874 F.2d at 1044.

2. Burden of Proof

There is a conflict regarding which party bears the burden of proof. The Third Circuit has held that a school district has the initial burden of justifying its educational placement at the administrative level and the burden in the district court if the student is challenging the agency decision. See Oberti, No. 92-5462 at 28. Other circuits have held that the burden of proof in the district court rests with the party challenging the agency decision. See Roland M. v. Concord Sch. Comm., 910 F.2d 983, 991 (1st Cir. 1990), cert. denied, 111 S.Ct. 1122 (1991); Kerkam v. McKenzie, 862 F.2d 884, 887 (D.C. Cir. 1988). Under either approach, in this case the District, which was challenging the agency decision, had the burden of demonstrating in the district court that its proposed placement provided mainstreaming to "the maximum extent appropriate."

3. Test for Determining Compliance with the IDEA's Mainstreaming Requirement

We have not adopted or devised a standard for determining the presence of compliance with 20 U.S.C. § 1412(5)(B). The Third, Fifth and Eleventh Circuits use what is known as the Daniel R.R.

test. Oberti, No. 92-5462 at 19-20; Greer, 950 F.2d at 696; Daniel R.R., 874 F.2d at 1048.[5] The Fourth, Sixth and Eighth Circuits apply the Roncker test. Devries v. Fairfax County Sch. Bd., 882 F.2d 876, 879 (4th Cir. 1989); A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158, 163 (8th Cir.), cert. denied, 484 U.S. 847 (1987); Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir.) cert. denied, 464 U.S. 864 (1983).[6]

Although the district court relied principally on Daniel R.R. and Greer, it did not specifically adopt the Daniel R.R. test over the Roncker test. Rather, it employed factors found in both lines of cases in its analysis. The result was a four-factor balancing test in which the court considered (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect Rachel had on the teacher and children in the regular class, and (4) the costs of mainstreaming Rachel. This analysis directly addresses the issue of the appropriate placement for a child with disabilities under the requirements of 20 U.S.C. § 1412(5)(b). Accordingly, we approve and adopt the test employed by the district court.

4. The District's Contentions on Appeal

The District strenuously disagrees with the district court's findings that Rachel was receiving academic and nonacademic benefits in a regular class and did not have a detrimental effect on the teacher or other students. It argues that the court's findings were contrary to the evidence of the state Diagnostic Center, and that the court should not have been persuaded by the testimony of Rachel's teacher, particularly her testimony that Rachel would need only a part-time aide in the future. The district court, however, conducted a full evidentiary hearing and made a thorough analysis. The court found the Hollands' evidence to be more persuasive. Moreover, the court asked Rachel's teacher extensive questions regarding Rachel's need for a part-time aide. We will not disturb the findings of the district court.

The District is also not persuasive on the issue of cost. The District now claims that it will lose up to $190,764 in state special education funding if Rachel is not enrolled in a special education class at least 51% of the day. However, the District has not sought a waiver pursuant to California Education Code § 56101. This section provides that (1) any school district may request a waiver of any provision of the Education Code if the waiver is necessary or beneficial to the student's IEP, and (2) the Board may grant the waiver when failure to do so would hinder compliance with federal mandates for a free appropriate education for children with disabilities. Cal. Ed. Code § 56101(a) & (b). (Deering 1992).

Finally, the District, citing Wilson v. Marana Unified Sch. Dist., 735 F.2d 1178 (9th Cir. 1984), argues that Rachel must receive her academic and functional curriculum in special education from a specially credentialed teacher. Wilson does not stand for this proposition. Rather, the court in Wilson stated:

> The school district argues that under state law a child who qualifies for special education must be taught by a teacher who is certificated in that child's particular area of disability. We do not agree and do not reach a decision on that broad assertion. We hold only, under our standard of review, that the school district's decision was a reasonable one under the circumstances of this case.

735 F.2d at 1180 (emphasis in original). More importantly, the District's proposition that Rachel must be taught by a special education teacher runs directly counter to the congressional preference that children with disabilities be educated in regular classes with children who are not disabled. See 20 U.S.C. § 1412(5)(B).

We affirm the judgment of the district court. While we cannot determine what the appropriate placement is for Rachel at the present time, we hold that the determination of the present and future appropriate placement for Rachel should be based on the principles set forth in this opinion and the opinion of the district court.

AFFIRMED.

1 The district court's opinion is reported in Board of Ed. v. Holland, 786 F. Supp. 874 (E.D. Cal. 1992).

2 An IEP is prepared for each child eligible for special education at a meeting between a representative from the school district, the child's teacher, and the child's parents. Board of Educ., v. Rowley, 458 U.S. 176, 182 (1982). The purpose of the IEP is to tailor the child's education to her individual needs. Id. at 181.

3 The 1990 IEP objectives include: speaking in 4 or 5 word sentences; repeating instructions of complex tasks; initiating and terminating conversations; stating her name, address and phone number; participating in a safety program with classmates; developing a 24-word sight vocabulary; counting to 25; printing her first and last names and the alphabet; playing cooperatively; participating in lunch without supervision; and identifying upper and lower case letters and the sounds associated with them.

4 The Hollands' experts testified Rachel had made significant strides at the Shalom School, and suggested that her motivation stemmed from her regular classroom placement. They stated Rachel was learning language and other skills from modeling the behavior of the other students. The District's experts, from the state Diagnostic Center, testified that Rachel had made little progress

toward her IEP goals, derived little benefit from regular class placement and suggested supplementary aids would be ineffective.

5 First, the court must determine "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily.. . ." Daniel R.R., 874 F.2d at 1048. If the court finds that education cannot be achieved satisfactorily in the regular classroom, then it must decide "whether the school has mainstreamed the child to the maximum extent appropriate." Id.

Factors the courts consider in applying the first prong of this test are (1) the steps the school district has taken to accommodate the child in a regular classroom; (2) whether the child will receive an educational benefit from regular education; (3) the child's overall educational experience in regular education; and (4) the effect the disabled child's presence has on the regular classroom. Daniel, R.R., 874 F.2d 1048-49; see also Oberti, No. 92-5462 at 20-24; Greer, 950 F.2d at 696-97. In Greer the court added the factor of cost, stating that "if the cost of educating a handicapped child in a regular classroom is so great that it would significantly impact upon the education of other children in the district, then education in a regular classroom is not appropriate." 950 F.2d at 697.

Regarding the second factor, the Oberti and Greer courts compared the educational benefits received in a regular classroom with the benefits received in a special education class. Oberti, No. 92-5462 at 22; Greer, 950 F.2d at 697.

6 According to the court in Roncker: "[W]here the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a nonsegregated setting. If they can, the placement in the segregated school would be inappropriate under the Act." 700 F.2d at 1063.

Courts are to (1) compare the benefits the child would receive in special education with those she would receive in regular education; (2) consider whether the child would be disruptive in the non-segregated setting, and (3) consider the cost of mainstreaming. Id.

18 IDELR 1019

960 F.2d 1479

W.G. v. Board of Trustees
W.G.; B.G., individually and as parents of R.G., a minor,
Plaintiffs-Appellants
v.

BOARD OF TRUSTEES OF TARGET RANGE SCHOOL DISTRICT NO. 23,

Defendant-Appellant

No. 91-35286

U.S. Court of Appeals, Ninth Circuit

APRIL 7 1992

* Free Appropriate Public Education (FAPE), Procedural Violations as Denial * Individualized Education Program (IEP), Participants in/Procedures for IEP Meeting

* Reimbursement to Parents, In General

Summary

The parents of a student with a significant learning disability sought reimbursement for the costs of private tutoring obtained for their son after they rejected a proposed IEP, which they claimed had been developed in violation of the procedural requirements of the IDEA. The district court found that the school district developed the IEP without participation of the student's classroom teacher or a representative of the private school where he had been unilaterally placed by his parents, that such a procedural flaw effectively denied FAPE to the student, and that the private tutoring had been appropriate. Accordingly, the district court ordered reimbursement, and the school district appealed.

HELD: for the parents.

The court of appeals held that the failure to ensure the attendance of all necessary parties at the IEP meeting resulted in the development of an incomplete and insufficient IEP for the student, in violation of the school district's affirmative duties under the IDEA. Thus, while certain procedural errors may not implicate the provision of an appropriate education, a procedural violation which results in an inadequate IEP, such as in this case, must be deemed a denial of FAPE. Moreover, in its review, the court of appeals found no reason to overrule the district court's determination that the private tutoring had been appropriate under the circumstances; therefore, the judgment of the district court was affirmed, and the order for reimbursement was upheld.

Counsel for Defendant-Appellant: Michael W. Sehestedt, Deputy Co. Atty., Missoula, MT.

Counsel for Plaintiffs-Appellees: Andree Larose, Montana Advocacy Program, Helena, MT.

Before Wallace, Chief Judge, Hug and Rymer, Circuit Judges.

HUG, Circuit Judge.

On Appeal from the U.S. District Court for the District of Montana.

The Board of Trustees of Target Range School District No. 23, in Missoula, Montana, appeals from the decision of the district court, holding that procedural flaws in the formulation of an individualized education program resulted in the denial of a FAPE, under the Education for All Handicapped Children Act ("Act"), 20 U.S.C. § 1401 et seq.,[1] and that the tutoring subsequently obtained for R.G. by his parents was an appropriate alternative for which the school district must reimburse the parents. We affirm.

I.

W.G. and B.G. are the parents of R.G., a minor child who has a significant specific learning disability. They reside in the Target Range School District in Montana.

R.G. attended Target Range School until he completed his fifth grade year. Despite occasional testing that revealed a discrepancy between R.G.'s intellect and his extremely poor academic performance, R.G.'s learning disability was not diagnosed by Target Range. During his first year, R.G. received language therapy. When he was in fifth grade, he was referred to the Chapter I reading program and received some "resource room" assistance with his homework. His teachers attributed his problems primarily to poor attention, forgetfulness, and behavior problems. R.G. was required to stay after school to complete his work, and he spent most evenings and weekends during his fifth grade year working on his studies. As a result of his problems in school, R.G. suffered low self-esteem throughout his years at Target Range School, and he began to suffer from physical symptoms of stress, such as gastrointestinal pain and insomnia, in the spring of his fourth grade year. During R.G.'s fifth grade year, his mother worried that he was suicidal.

In 1985, B.G. requested an independent evaluation for R.G. The evaluation resulted in a diagnosis of a significant specific learning disability related to the manner in which R.G. processed information. Upon receipt of the independent evaluation, Target Range School convened a Child Study Team ("CST") meeting on May 23, 1985. The team refused to identify R.G. as learning disabled and to develop an Individualized Educational Program ("IEP") for him at that time, although the team agreed to continue to provide schoolwork assistance for R.G. in the school resource room.

Following an inquiry by B.G. about the criteria for determining the existence of a specific learning disability, the Montana Office of Public Instruction informed Target Range School on May 31, 1985, that the determination of a learning disability could be made only by a CST.

W.G. and B.G. then decided to enroll R.G. at St. Joseph Elementary School, a private school located outside the Target Range School District, in the fall of 1985.

Target Range did not attempt to reconvene or establish a CST for R.G. until 1987, after St. Joseph School conducted psychological tests on R.G. and a St. Joseph School CST found R.G. to be learning disabled. The Target Range School principal and the Target Range School psychologist attended the St. Joseph CST meeting. The Target Range School principal agreed with the CST that R.G. was learning disabled, and arranged an October 5, 1987, meeting of representatives from both schools to develop an IEP for R.G. R.G.'s parents told Target Range officials that they would arrange for attendance by St. Joseph School officials. However, the St. Joseph participants were unable to attend.

Despite their absence, the Target Range principal proceeded with the October 5 meeting and presented a prepared IEP for R.G., which called for application of the program used at that time at Target Range, the Scott Foresman Focus Program. W.G. and B.G. expressed concern about that program and requested that the school use "direct instruction" materials as recommended by the St. Joseph school psychologist and special education teacher.2 However, the team did not discuss alternatives to the Foresman program and the St. Joseph school representatives were not present to discuss the appropriateness of the materials.

W.G. and B.G. refused to sign the partially completed IEP and presented the principal with a list of ten factors that they wished to have included in the IEP. Those factors were:

1) Resource service provided at St. Joseph School following their school calendar, effective immediately.

2) Resource service to consist of: Reading Mastery IV or V, depending on a placement test, Expressive Writing 1, Spelling Mastery Level C or D, depending on a placement test.

3) Minimum of 2 hours per day, 5 days per week, to correlate with St. Joseph schedule (to include the Language Block).

4) Minimum 2 hours to consist of: Reading Mastery 30-45 min., Expressive Writing 1-30 min., Spelling Mastery Level C or D 30 min., and tutoring in Social Studies, Science and Math as needed 20 min. per day, 5 days per week.

5) Resource Room ratio of no more than 3-1 with other grade-related students.

6) All meetings and future placement testing regarding R.G. to take place at St. Joseph School.

7) R.G. should be given the choice of a written or oral test. This test should be administered during his related class period. He should be given the choice of written or oral questions and written or oral answers.

8) R.G. should receive a report card showing letter grades adjusted in relation to his learning disability. A formal pass/fail report card is to be included in his school records with a copy to the parents. R.G.'s grading system should reflect his accountability to accomplish 50% of the required work at this time. The Resource teacher will coordinate with the St. Joseph staff in developing the grading system and assigning grades.

9) Classroom instruction for R.G. will be developed and coordinated between the Resource teacher and the affected staff. For example: developing what 50% of the course material R.G. will be responsible for.

10) Develop short-term instructional objectives to be reviewed at the end of this school quarter (Oct. 30, 1987).

The principal told W.G. and B.G. that he would respond to their list within a short period. The principal responded specifically by letter only to the request that services be provided at St. Joseph School, or that transportation to Target Range School from St. Joseph School be provided for R.G. Target Range informed W.G. and B.G. that Target Range School District did not have a duty to comply with their requests but that R.G. was welcome to have his IEP administered at Target Range School. As a result, W.G. and B.G. obtained private instruction for R.G. that used the instruction methods recommended by the St. Joseph CST. Target Range School did not attempt to continue the October 5, 1987, meeting in order to develop an IEP in compliance with statutory requirements.

W.G. and B.G. filed a complaint with the Montana Office of Public Instruction and requested reimbursement for the private tutoring they obtained for R.G. during the 1987-88 school year. The hearing examiner denied the request, holding that Target Range had offered R.G. a free appropriate education that W.G. and B.G. had chosen not to accept, and that W.G. and B.G.'s unilateral placement of R.G. with an insufficiently trained tutor was not an appropriate placement reasonably calculated to enable R.G.
to receive educational benefits according to Board of Educ. v. Rowley, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3050-51, 73 L.Ed.2d 690 (1982).
W.G. and B.G. appealed the decision of the administrative hearing officer to the United States District Court, which had jurisdiction to review the decision of the state agency and to hear additional evidence under 20 U.S.C. § 1415(e)(2), (4). Relying on Hall by Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir.1985), the district court held that Target Range failed to provide R.G. with a free, appropriate education, as required by the Education of the Handicapped Act, because the IEP was not developed in accordance with the Act. The court also found that the tutoring arranged by W.G. and B.G. was sufficient to provide R.G. with an appropriate education. The court ordered Target Range to reimburse W.G. and B.G. for the tutoring provided to R.G. during the 1987-88 school year.
Target Range timely appeals. We have jurisdiction to review the final judgment of the district court under 28 U.S.C. § 1291.

II.

This court reviews the district court's findings of fact for clear error. Gregory K. v. Longview School Dist., 811 F.2d 1307, 1310 (9th Cir.1987). The district court's conclusions of law are reviewed de novo. Id. Whether the school district's proposed IEP was a "free appropriate public education," as required by the Education for All Handicapped Children Act, amended as the Individuals with Disabilities Education Act, is a mixed question of law and fact that we review de novo. Id. Whether a special education placement is appropriate is reviewed de novo. Id. at 1314. The deference due state administrative findings on matters that we review de novo is a matter for the discretion of this court. Id. at 1311.

III.

A. The Act

The Act, as amended by Individuals with Disabilities Education Act ("IDEA"), assures all handicapped children a free appropriate public education ("FAPE") through individualized education programs. See 20 U.S.C. § 1400(c). To receive federal funds for educating handicapped children, states must comply with the provisions of the Act. 20 U.S.C. §§ 1412, 1414(b)(2)(A), 1416. Montana law echoes the requirements of the Act. See Mont.Code Ann.

§ 20-7-401 et seq. State standards that are not inconsistent with federal standards are also enforceable in federal court. See Gregory K., 811 F.2d at 1311-12; see also Roland M. v. Concord Sch. Comm., 910 F.2d 983, 987 (1st Cir.1990), cert. denied, __ U.S. __, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991).

The Act requires states and local education agencies to guarantee procedural safeguards for handicapped children and their parents in the provision of a FAPE. 20 U.S.C. § 1415(a). Central among the safeguards is the process of developing an "individualized education program" ("IEP") for each child. 20 U.S.C. §§ 1401(a)(18)(D), 1412(1); Rowley, 458 U.S. at 181, 102 S.Ct. at 3038; see also Roland M., 910 F.2d at 987.

An IEP is a written statement for a disabled child developed in a meeting by a representative of the local educational agency who is qualified "to provide, or supervise the provision of, specially designed instruction," the child's regular classroom teacher, the parents, and the child, if appropriate. 20 U.S.C. § 1401(a)(19); see also Mont.Admin.R. 10.16.1207. The IEP includes an assessment of the present performance of the child, a statement of annual goals and short-term instructional objectives, specific services to be provided, the extent to which the child can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. 20 U.S.C. § 1401(a)(19). The Act provides for parental participation and even for cooperation with parochial schools in the formulation of an IEP. 20 U.S.C. §§ 1413(a)(4)(A), 1415; 34 C.F.R. §§ 300.345, 300.348.

The Act also provides for review of administrative determinations. 20 U.S.C. § 1415(e)(2). The reviewing court first must examine whether the state has complied with the procedures established by the Act, and then must determine whether the IEP is reasonably calculated to enable the child to receive educational benefits. Rowley, 458 U.S. at 206-07 & n. 27, 102 S.Ct. at 3050-51 & n. 27. Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity, Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir.1990), or seriously infringe the parents' opportunity to participate in the IEP formulation process, Roland M., 910 F.2d at 994; Hall, 774 F.2d at 635, clearly result in the denial of a FAPE.

B. Compliance

Target Range School District argues that the district court made a clearly erroneous finding that procedural error in the formulation of the IEP denied R.G. a FAPE. Specifically, Target Range objects to the court's finding that Target Range prepared an IEP prior to the IEP meeting, rather than developing the IEP according to the procedures set forth in the IDEA. Although Target Range admits other procedural flaws in the IEP, it argues that the procedural requirements of the Act should be interpreted broadly and that the overriding goal of parental participation in the IEP process was served. We disagree.

Target Range clearly did not comply with the procedures required by the IDEA. The district court found that Target Range independently developed the IEP that it presented to W.G. and B.G., without the input and participation of W.G. and B.G., R.G.'s regular classroom teacher, or any representative of St. Joseph School, in direct violation of 20 U.S.C. § 1401(a)(19). The record supports the findings of the district court.

Target Range proposed an IEP that would place R.G. in a preexisting, predetermined program. At the IEP meeting, the Target Range special education teacher advocated use of the Scott Foresman Focus Program, and no alternatives to that program were considered despite the objections of W.G. and B.G. W.G. testified that the district assumed a "take it or leave it" position at the meeting.

Even if the district court's finding that the school prepared the report were disregarded, other significant procedural errors existed and were admitted by Target Range. The school failed to make efforts to include R.G.'s teacher in the process, as required by 34 C.F.R. § 300.344. Because R.G. was enrolled in a parochial school, Target Range was required to ensure participation by the private school in the formulation of the IEP. 34 C.F.R. § 300.348. Target Range made no effort to do so after its initial delegation of the duty to invite the parochial school representative to the October 5, 1987, IEP meeting.

As a result, in its decision to place R.G. in special education classes at Target Range and in the particular program there, Target Range did not consider the recommendations of persons "knowledgeable" about R.G., as required by 34 C.F.R. § 300.533. See Taylor by Holbrook v. Bd. of Educ., 649 F.Supp. 1253, 1256-58 (N.D.N.Y.1986) (where school district failed to consider recommendations of persons "most knowledgeable" about the child, including his teacher and doctors, the IEP was not reasonably calculated to enable child to receive education benefits). Target Range did not attempt to reconvene the meeting in order to include the required participants.

Target Range's failure to secure the participation of St. Joseph School personnel also resulted in violations of section 1414(a)(1), which requires preparation of a comprehensive evaluation of the student as a basis for developing the IEP, and section 1401(a)(19) which specifies the elements necessary for a complete IEP.

While rigid "adherence to the laundry list of items given in section 1401(19)" is not paramount, see Doe v. Defendant I, 898 F.2d 1186, 1190-91 (6th Cir.1990), we are not in this case concerned with a complete IEP prepared otherwise according to the requirements of the Act. See id. at 1189-90 (although the IEP document did not include two of the § 1401(a)(19) factors, IEP not invalid, because all information required by § 1401(a)(19) was well known to the administrators and the parents, who, with other required parties, had participated fully in the development of the IEP).

When a district fails to meet the procedural requirements of the Act by failing to develop an IEP in the manner specified, the purposes of the Act are not served, and the district may have failed to provide a FAPE. The significance of the procedures provided by the IDEA goes beyond any measure of a child's academic progress during the period at issue. As the Court in Rowley said, "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation" at every step "as it did upon the measurement of the resulting IEP." Rowley, 458 U.S. at 205-06, 102 S.Ct. at 3050-51.

Target Range's arguments that the parents are to blame because they left the IEP meeting, did not file a dissenting report, and led the district to believe that the principal problem was transportation, are without merit. The parents had no obligation to file a dissent. The school district was well aware of their concerns, which ranged from specific methodologies and student-teacher ratios to transportation and the location of special education services, as outlined in detail in the document W.G. and B.G. gave to the Target Range School principal at the October 5, 1987, meeting.

The Act imposes upon the school district the duty to conduct a meaningful meeting with the appropriate parties. Target Range failed to do so. Target Range failed to fulfill the goal of parental participation in the IEP process and failed to develop a complete and sufficiently individualized educational program according to the procedures specified by the Act.

In holding that the procedural defects in the development of the IEP resulted in denying R.G. a FAPE, the district court relied on Hall, 774 F.2d at 635. There the Fourth Circuit wrote that a school district's failure to inform parents of their procedural rights and the availability of public funding, and its failure to develop an IEP with the specificity required by 20 U.S.C. § 1401(a)(19), were adequate grounds for holding under Rowley that the school had failed to provide a FAPE. See id. The decision in Hall did not rest on the procedural errors alone, because the court found that the services actually provided to the child were not reasonably calculated to enable him to receive educational benefits. See 774 F.2d at 635. No IEP was completed and offered to R.G., and no services were actually provided to R.G., so we are concerned primarily with the first part of the Rowley test: procedural compliance.

Target Range contends that a later Fourth Circuit case, Denton, 895 F.2d at 982, stands for the proposition that only those procedural faults that cause a student loss of benefits result in a denial of a FAPE. We disagree. Denton involved comparatively minor procedural violations. See Denton, 895 F.2d at 982. The IEP in Denton was not prepared within the period provided by North Carolina law because the school awaited updated evaluations from the student's former school. 895 F.2d at 976. A complete IEP was presented four days after the school received the evaluations. Id. The Fourth Circuit held that the Board's procedural failure in that case did not deprive the child of educational benefits and did not deny him a FAPE. Id. at 982.

Because we hold that Target Range failed to develop the IEP according to the procedures required by the Act and by Montana law, we need not address the question of whether the proposed partial IEP was reasonably calculated to enable R.G. to receive educational benefits. See Rowley, 458 U.S. at 201, 204-05, 102 S.Ct. at 3048, 3049-50; 20 U.S.C. § 1401(a)(19).

IV.

Target Range contends that W.G. and B.G. should be barred from obtaining relief because they contributed to the procedural errors and did not raise them until a pre-hearing conference in July, 1988.

Parents have an equitable right to reimbursement for the cost of providing an appropriate education when a school district has failed to offer a child a FAPE. School Comm. v. Dept. of Educ., 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). The conduct of both parties must be reviewed to determine whether relief is appropriate. Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir.1986).

Target Range contends that the procedural errors stem almost entirely from the failure of representatives of St. Joseph School to attend the IEP meeting on October 5, 1987. However, the statute places the responsibility for the IEP process in the hands of the state and local education agencies. 20 U.S.C. §§ 1401(a)(18), 1412(6), 1414(a)(5); 34 C.F.R. § 300.344. The regulations clearly provide that if the representative of the private school cannot attend the IEP meetings, the agency "shall use other methods to insure participation by the private school, including individual or conference telephone calls." 34 C.F.R. § 300.348(b) (emphasis added). Target Range does not claim that it attempted to comply with that requirement. No action by the parents indicated waiver of the private school's participation. Indeed, that participation is not one the parents could waive; the requirement exists for the purpose of creating an effective IEP. That the parents elected to proceed with the October 5, 1987, meeting does not relieve Target Range of its responsibilities under the Act.

Target Range also claims that the parents failed to respond to its correspondence, including its March 7, 1988, letter to their attorney offering to convene another IEP meeting if R.G. were to be placed at Target Range. The school enclosed with the letter a copy of the opinion of the Montana Office of Public Instruction that the school was not required to provide transportation for R.G. from the parochial school to Target Range. The school contends that the parents' insistence on transportation and failure to assert their complaints about the IEP procedure prior to the pre-hearing conference sullied the hands of the parents and should bar relief. We disagree. As W.G. and B.G. argue, their initial ten requests given to Target Range on October 5, 1987, gave notice of the importance of the participation of St. Joseph School personnel in the IEP process and of the parents' various substantive concerns.

The responsibility for preparing an IEP lies primarily with the educational agency. Although the parents, through their attorney, requested another IEP meeting in November, 1987, Target Range did not indicate that it was prepared to reconvene IEP meetings until its letter of March 7, 1988, addressed to the attorney for W.G. and B.G., five months after the initial meeting and more than half way through the school year. Target Range never replied to the specific concerns of the parents as outlined in their written requests of October 5, 1987. Its claim that the delays are the fault of the parents is without merit.

Target Range cites Doe v. Alabama State Dep't of Educ. to support its argument that the parents' contributions to the delays bar their recovery. See 915 F.2d 651, 663 (11th Cir.1990). However, in Doe, the child received services from the school before an IEP was in place. An appropriate IEP process was underway and a final IEP was not in effect because the child's parents and the school had not yet agreed. Id.

R.G. received no services from Target Range during the time in question. Target Range did make clear to W.G. and B.G. that services for R.G. would be provided at Target Range. However, the Act does not require parents to place their children in public schools when an IEP is merely under discussion. W.G. and B.G. are not barred as a matter of equity from recovering.

V.

Target Range contends that the district court clearly erred in finding that the tutoring secured by W.G. and B.G. for R.G. was an appropriate alternative educational program for which the parents should be reimbursed. Target Range argues that the private tutoring was inappropriate and resulted in no measurable progress. The tutor used a method other than that determined by Target Range to be appropriate and for which the tutor had not been trained to teach.

The Act requires the school district to provide the child with a FAPE. The substantive standard is simply "some educational benefit." See Alamo Heights, 790 F.2d at 1158. The reviewing court may order school authorities to reimburse parents for private educational expenses if the placement, "rather than a proposed IEP, is proper under the Act." School Comm. v. Department of Educ., 471 U.S. at 369, 105 S.Ct. at 2002.

We have determined that an appropriate IEP was not offered. We now examine whether the private placement was appropriate. The district court based its findings on the testimony of R.G.'s teachers. The tutor, qualified by the public school district to teach learning disabled students, followed the program recommended by the St. Joseph School psychologist and special education teacher. R.G.'s teachers testified that his performance in school had improved.

Target Range argues that R.G. showed no measurable progress on standardized tests as a result of the tutoring. However, the district court found that the tutoring provided R.G. with an appropriate education. Standardized tests are not the sole indicator of a student's progress. The Act does not require as much. See Hall, 774 F.2d at 636. An IEP must provide "some educational benefit" to a child, but no IEP was in place for R.G. and Target Range has not shown that R.G. received no educational benefit from the tutoring. Expert witness Jan Lieber testified that remediation "takes a long time" and that she would "not necessarily expect to see significant improvement on the basis of the tutoring" in the short term.

Next, Target Range argues that the tutor did not use the program determined to be appropriate by the school district to address R.G.'s sequential processing problem. First, this alone does not bar recovery. See Alamo Heights, 790 F.2d at 1161. In Alamo Heights, the parent disagreed with the terms of a change to the IEP in place for her child. See 790 F.2d at 1158-59. She unilaterally placed her child in a program that was not found to be the specific type of programming required by Act. However, the Fifth Circuit held that this did not preclude reimbursement. "[P]arents who elect to risk shouldering the costs of what they perceive to be a more appropriate placement," and whose judgment is vindicated by the district court, are entitled to reimbursement. Id. at 1161. The court of appeals remanded to the district court for a determination of appropriate reimbursement. Factors to be considered included the existence of other, more suitable placements, the effort expended by the parent in "securing alternative placements" and the general cooperative or uncooperative position of the school district. Id.

Second, Target Range's claim that R.G. should have had lessons directed at his sequential processing problem is hollow, according to W.G. and B.G. The Target Range School principal testified that Target Range would have used direct instruction materials rather than the materials specified in the proposed IEP. Also, curriculum expert Jan Lieber testified that the materials chosen by the St. Joseph School staff were appropriate and were taught appropriately.

Our review of the record supports the finding that the tutoring was appropriate, under the circumstances. Target Range failed to provide R.G. with a FAPE by failing to comply with the specified procedures for preparing the IEP. Furthermore, all of this occurred during the school year. R.G.'s parents were entitled to secure a special education placement for R.G. until an IEP was prepared properly, and they are entitled to reimbursement.

AFFIRMED

---

[1] The Act was amended by the Education of the Handicapped Act Amendments of 1990, Pub.L. No. 101-476, 104 Stat. 1103 (1990), and is now referred to as the Individuals with Disabilities Education Act. Pub.L. No. 101-476, Title IX, § 901(a)(3), 104 Stat. 1142. References in this opinion are to the Act as numbered prior to the 1990 amendments.

[2] The direct instruction materials were described by one expert witness at the administrative hearing as a very structured, carefully sequenced curriculum designed for "learning by being more accurate rather than guessing and using context information in order to draw conclusions." The Scott Foresman Focus Program was described as a "context" approach designed for developmental learning, as opposed to the kind of remediation needed by R.G. Id. at 28-30.

Section N

ADE FORMS and PROCEDURES

BEST COPY AVAILABLE

Due Process Hearings
Suggested Letter Formats

Most of the following information was disseminated to Special Education Due Process Hearing Officers, Superintendents of Schools, and LEA Special Education Directors in Memorandum **SPED 95-18** dated December 2, 1994, from Dr. Kathryn A. Lund, State Director of Exceptional Student Services.

As part of our continued efforts to ensure that the 45-day time line governing due process hearing decisions is met, the Arizona Department of Education, Exceptional Student Services, (ADE/ESS) is providing several suggested letter formats for use in expediting the processing of requests for due process. Because no two cases are the same, the suggested letter/forms should only be considered as guidelines. Since parents or legal guardians initiate the majority of requests for due process, we have drafted the letterforms accordingly. In the event a school district initiates due process, editorial changes will be required.

Attachment A: Once the school district has identified a hearing officer, a brief letter should be sent by the district to the hearing officer to confirm that person's retention and to provide basic information, *i.e.* (1) the names of the parties, (2) the names of their representatives, (3) all pertinent telephone numbers and addresses, and (4) a copy of the due process hearing request. This information will permit the hearing officer to contact the parties in a timely manner. If at all possible, it is requested that correspondence be faxed so that the preliminary procedural matters do not consume a large portion of the 45-day period.

Attachment B: This letter format is to be used by the hearing officer and sent to the district to confirm that the hearing officer has been retained and to note that the district will issue a purchase order for these services. The terms negotiated between the hearing officer and the school district do not have to be made known to or approved by the Arizona Department of Education.

Attachment C: This letter format should be used by the hearing officer as the first communication between the hearing officer and the parties. Its primary purpose is to introduce the hearing officer to the parties and to schedule a pre-hearing conference. If the parents are unrepresented and do not have a fax number, the correspondence should be mailed so that the parties receive the communication at the same or similar time.

The pre-hearing conference does not have to be telephonic but can be a face-to-face meeting. Where both parties are represented, telephonic meetings are efficient and less expensive than a face-to-face meeting. The earlier in the 45-day time line that the pre-hearing conference can be conducted, the better. The pre-hearing conference identifies the issues that are truly in dispute. Many times, it is possible for the parties to work out their disagreement once issues have been formally defined. It also permits the hearing officer to raise the issue of settlement or mediation if the circumstances suggest that exploration of this issue would be beneficial to the parties. Conducting the pre-hearing conference provides an opportunity for the hearing officer to advise all parties how the hearing will be conducted. Establishing ground rules, which remove surprise from the proceedings, will result in a more efficient and focused evidentiary hearing.

Establishing the issues and the scope of the hearing will also permit the parties to better utilize their time in preparing for the hearing. With this in mind, the letter notifying the parties of the intent of the hearing officer to conduct a pre-hearing conference should apprise them of the matter to be discussed so they can participate at a time when they are fully prepared to do so. The letter identifies the main topics to be covered in the pre-hearing conference.

The first issue should always be a review of whether any party has any objection to the assignment of a particular hearing officer. If there is a legitimate basis to object to the assignment, the hearing officer should remove him/herself immediately so that minimal delay results from the disqualification

The second and most important issue to be addressed at the pre-hearing conference is definition of the legal issues. This is essential to determine whether the hearing officer has jurisdiction under the Individuals with Disabilities Education Act (IDEA) or whether the parties' dispute needs to be resolved in a different forum.

Depending upon the fact of the case, other materials should be freely referenced in resolving the issues. Certain enclosures are referenced and should be included with the letter.

The proposed form for the agenda will inform the parties as to the general format of the hearing. Depending upon the particular circumstances of each case, the petitioner may be the parent or the district, charter school or agency.

The witness list is also a suggested format. Please note that it is requested that the parties provide a summary list of testimony, which each witness will give. The purpose of this is to provide notice to the other side as to the general substance of the testimony. It is not typical that extensive discovery is conducted in administrative hearings. By providing a summary, basic discovery can be avoided.

Attachment D: This letter is to be sent after the pre-hearing conference has been conducted. This document is extremely important as it serves to confirm the definition of issues to be determined at the due process hearing, the date the hearing will occur, pre-hearing deadlines, and various responsibilities of the parties. The confirmation letter can also help to avoid unnecessary issues arising at hearing, such as (1) a party's failure to appear; (2) a party's failure to meet a pre-hearing deadline; (3) a party not being prepared to proceed with the provision of evidence; (4) a party seeking a last-minute continuance where good cause is not shown; (5) assuring that an appropriate and accessible location has been set aside for the hearing (6) assuring that interpreters or assistive technology devices are available, if needed; and (7) assuring that a record is prepared of the hearing. The letter does not have to be a verbatim recitation of everything discussed in the pre-hearing conference. Its chief purpose is to set forth the matters either stipulated to by the parties or ordered by the hearing officer. While many disputes will require only one pre-hearing conference, there may be occasions when two or more conferences will prove to be of assistance. In each case, the hearing officer should prepare and issue a letter confirming the matters addressed in each conference. This document should be prepared as close in time as possible to the pre-hearing conference and should be either mailed or sent by fax to the parties.

Attachment E: This letter format is intended to address the situation where, subsequent to being retained as the hearing officer, the parties are able to reach a settlement and the due process request is withdrawn. Settlement can occur at any time (*e.g.*, before or after a pre-hearing conference or during the due process hearing itself), and the form of settlement can be by various types of documents (*e.g.*, settlement agreement, letter of agreement, withdrawal form). This letter must contain an accurate statement as to the agreements reached and the actions to be taken by all parties to document the settlement. It is very important to provide a copy of this agreement to the ADE/ESS as formal notice of the status of the due process proceedings and the manner of resolution.

Attachment F: A copy of a memorandum to all individuals trained as Special Education Due Process Hearing Officers, dated September 2, 1994, from Exceptional Student Services regarding 45-day timeline procedures for hearing decisions is also attached. This document provides instructions and information regarding the requirements for adhering to mandated timelines and discusses provisions for granting specific extensions.

Attachment G: A copy of the information faxed to the district, charter school or agency in response to a request for a hearing officer describes the process that is utilized once a hearing has been requested.

Timeline Extension Confirmation: A copy of the information needed to extend the forty-five (45) day timeline. Extensions may be granted by the hearing officer for good cause.

Due Process Model Complaint Form: This form is being distributed as a model for filing a request for due process.

Special Education Rights of Parents and Children under the Individuals with Disabilities Education Act (IDEA) Amended 1997

Attachment A

[*District Letterhead*]

[*Date*]

VIA TELEFACSIMILE

[*Hearing Officer*]
____
____

Re: Request for Due Process in the matter of [*student name*]

Dear [*Hearing Officer*]:

The [*District, Charter School or Agency*] has received a request for due process by the [*legal guardians*] of [*student's name*]. (Copy enclosed) This letter is to confirm that the [*District, Charter School or Agency*] has requested that you serve as the impartial due process hearing officer in this matter.

The District, Charter School or Agency will be represented in this matter by [*name, address, and phone/fax numbers of legal counsel*].

The [*legal guardians*] are [representing themselves, their address, phone/fax numbers are ______________] [*represented by attorney/ advocate name, address, phone/fax numbers*]. The [*District, Charter School or Agency*] has provided [*will provide*] the parents with information concerning the availability of low/no cost legal services.

Sincerely,

____
Director of Special Education

Enclosure

Cc: [*District Superintendent*]
[*Due Process Coordinator, Arizona Department of Education/ Exceptional Student Services*]

Attachment B

[*Hearing Officer Letterhead*]

[*Date*]

VIA FACSIMILE

____
Director of Special Education
[*District, Charter School or Agency*]
____
______________, Arizona 85______

Re: In the Special Education Matter of [*Student's name*]

Dear ______________:

This letter will confirm that I have been chosen to serve as the impartial due process hearing officer in the above referenced matter. The district will issue a purchase order reflecting its agreement to pay my hourly rate of $______and reimbursement for the actual expenses associated with the due process hearing, including photocopies, faxing, postage (including express mail, if approved in advance), conference calls and mileage. [***Note**: these elements may require modification, dependent upon the particular terms negotiated with the district*].

Sincerely,

____
Hearing Officer

Attachment C

[*Hearing Officer Letterhead*]

[*Date*]

VIA FACSIMILE

[*Parent's representative*]____________
____
____
____

[*School/agency's legal counsel*]_____
____
____
____

Re: [*student's name / District, Charter School or Agency*]

Dear ______________ and ______________:

I have been chosen to serve as the due process hearing officer in response to the request for a due process hearing submitted by [*the parents/guardians of student name*] or [*the District, Charter School or Agency*]. I have been provided with a copy of the [date] letter submitted by [*author's name*] and addressed to [*name, title*] at [*the District, Charter School or Agency*].

The due process hearing is scheduled to commence on _________day, _____________, 19___ at ____ _. m. at [street address], [city], Arizona in the ___________ Conference Room of [*the District, Charter School or Agency*]. I would ask both parties to also reserve ______day, _______________, 19___, for hearing in the event the evidentiary portion of the hearing cannot be concluded in one day. If either party has a conflict with these dates, please advise during the pre-hearing conference. The purpose of this letter is to address certain procedural ground rules for the hearing.

A. Pre-Hearing Telephonic Conference.

A pre-hearing telephonic conference will be conducted on ____day, __________, 19__ at ____ _ .m. I will set up the call and contact the parties at the following telephone numbers: [*parent's representative (____-______) and district legal counsel (____-_______)*]. If this date or time presents a conflict for either party or if the stated telephone numbers are incorrect, please notify me immediately.

The purpose of the pre-hearing conference is to establish the following information:

1. To determine whether either party has a concern about my serving as the hearing officer in this matter;
2. To confirm whether the [*date*] letter of [*author's name*] accurately states the issues which the petitioner wishes to raise at the hearing and, if not, what other additional legal and/or factual issues are to be presented concerning [*student's name*]. No new issues will be allowed to be asserted at the due process hearing, absent good cause why they were not raised at the pre-hearing conference;

3. Whether either side intends to raise any procedural issues; for example, jurisdiction of the hearing officer, other necessary parties, notices, etc.;

4. The estimated number of witnesses to be called by each party and, briefly, the topics to which you anticipate they will testify;

5. Whether the parent has been provided the opportunity to inspect their [*son's/daughter's*] educational records;

6. Who will proceed first and how the hearing will be handled;

7. How much time the parties estimate the hearing will require;

8. Various procedural issues associated with the hearing (open/closed, child present or not, form of record, whether an interpreter is necessary, whether any assistive technology devices are necessary, whether any participant requires special accommodations, whether each hearing and each review involving oral arguments which is to be conducted will be at a time and place that is reasonably convenient to the parents and child involved, etc.);

9. Whether any briefs are to be submitted and, if so, when;

10. Whether there are any material facts with respect to these issues to which the parties can stipulate or agree; for example, a summary of the student's educational history, chronology of events, etc.;

11. The timing and manner by which information about evidence to be introduced at hearing will be exchanged by the parties; and

12. Whether there are any other matters of importance which the parties would like to bring to my attention.

I will prepare a letter summarizing the matters discussed and agreed upon during the pre-hearing conference for your reference. The letter will become part of the administrative record. Therefore, either party will have the right to state any objection, correction or supplementation to it.

I am enclosing the agenda for the hearing so the parties will be aware of the steps that will occur and the order in which they will occur. Should either party have any questions concerning the agenda, we may discuss those during the pre-hearing telephonic conference.

B. List of Witnesses and Exhibits:

Unless [*counsel for*] the parties wish to otherwise stipulate, each party must submit its list of witnesses and produce copies of its exhibits, together with a table of contents, no less than five (5) calendar days in advance of the hearing. I am enclosing a sample form on which the parties may list their witnesses. Please note that an address for witnesses is requested so that notice of the hearing can be sent to them. Please be advised that each party will only be able to call those individuals as witnesses at the hearing, which they have specifically listed on their list of witnesses. Similarly, no documents or other exhibits shall be received into evidence at the hearing unless they have been timely exchanged with the other party. The deadlines for exchanging this information and the mechanics for doing so will be established during the pre-hearing conference call.

Should either party wish that subpoenas be issued, they must be forwarded to me for issuance. Any subpoenas will be returned to you so that service may be accomplished.

C. Open or Closed Hearing:

Mr. and Mrs. [*parents*] have the right to request that the special education due process hearing be closed, i.e. no members of the public will be permitted to attend, or open, i.e. members of the public may attend. The presumption is that the hearing will be closed. If the petitioner desires to have an open hearing, please advise me of this fact during the telephonic conference.

Should either party have any questions of the hearing officer, I may be contacted through my secretary by telephone at (area code) ____-______ or in writing at the above address. I would request that if any correspondence is sent to me, that the sending party copies the opposing party and the Arizona Department of Education/Exceptional Student Services on the correspondence. Similarly, if any telephonic contact is made, I would request that the party calling me attempt to conference in the other side.

Very truly yours,

____
Hearing Officer

Enclosures:
Statement of Qualifications
Agenda
List of Witnesses Form
Cc: [*Parent(s)*]
[*Special Education Director*]
[*Due Process Coordinator, Arizona Department of Education/ Exceptional Student Services*]

Attachment C-2

HEARING AGENDA

[*Student's Name*] v. ____________________ School District

[*time, day and date of hearing*]

[*address where hearing will be held*]

I. Formal Call to Order

II. Introductory Statement by Hearing Officer
   - A. Introduction of Hearing Officer
   - B. Statement of open or closed hearing
   - C. Introduction of participants for record
   - D. Purpose of the hearing
   - E. Explanation of hearing procedures

III. Opening of Formal Testimony
   - A. Opening statement
      - 1. Petitioner
      - 2. Respondent
   - B. Presentation of Written Evidence and Testimony
      - 1. Written evidence
         - a. Petitioner
         - b. Respondent
      - 2. Testimony of witnesses
         - a. Petitioner
         - b. Respondent
         - c. Petitioner (rebuttal)
   - C. Closing Arguments
      - 1. Petitioner
      - 2. Respondent
      - 3. Petitioner

IV. Closing Statements by Hearing Officer
   - A. Availability of record of hearing
   - B. Filing of post-hearing documents
   - C. Decision date
   - D. Procedures for appeal

Attachment C-3

Information on Witnesses **Re:** *[Student's Name]* ____________

Please complete the following information concerning the witnesses you intend to call at the impartial due process hearing so that notice of the date, time, and place of the hearing may be provided to those witnesses.

Witnesses:

Name/Address	Summary of Testimony / Topic
1)	
2)	
3)	
4)	
5)	

Attachment D

[*Hearing Officer Letterhead*]

[*Date*]

[*Parent's representative*]

[*School/agency's legal counsel*]

Re: [*student's name / District, Charter School or Agency*]

Dear ______________ and ______________:

On [*day*], [*date*] from [*time*] to [*time*] a.m./p.m., the telephonic pre-hearing conference for the above referenced matter was conducted. Present were (1) [*parent(s)*], (2) [*parent's lawyer or advocate*], (3) [*school/agency's representative*] and (4) [*school/agency's legal counsel*].

The matters addressed and determined during the pre-hearing conference were as follows:

1. Legal Issues on Which Due Process is Requested: [*Specify all issues that are identified after confirming the wording of the issues. If the parties agree that certain issues are not in dispute, note this fact as well*].

2. Access to the Student's Educational Records: [*Address if relevant, otherwise delete*].

3. Estimate Number of Witnesses and Topic Summary of Testimony:

    a. Petitioner: [*parent representative*] identified ___ individuals as witnesses:

        i. [*name: area of testimony*]
        ii. [*name; area of testimony*]

    b. Respondent: [*school/agency*] identified ___ individuals as witnesses:

        i. [*name: area of testimony*]
        ii. [*name: area of testimony*]

4. Estimated Length of Hearing: [*parent's representative*] indicated that Petitioner's presentation of evidence was estimated as requiring ____ hours/days. [*District's representative*] indicated that Respondent's presentation of evidence was estimated as requiring ____ hours/days.

5. Hearing Date: The hearing will commence on [*day*], [*date*] at [*time*] o'clock and will be conducted at ________________ which is located at [*insert full street address*], telephone (602) ____-______. The hearing will run consecutively on [*dates*] until completed.

6. Procedural Issues: The conduct of the hearing will be as follows:

   a. Order of presentation of evidence: Given the circumstances of this case, the [*Petitioner/Respondent*] will present their case first, followed by the [*Respondent/Petitioner*].

   b. Burden of Proof: The school/agency has the burden of proof on [*all issues/certain issues. If only certain issues, specify which party bears the burden of proof on each issue.*]

   c. Representation of Parent(s)/Legal Guardian: The parents have been advised of low cost or free legal services by the school or agency. The parents will be represented by lawyer/advocate __________________.

   d. Open/Closed Hearing: Petitioner has requested that the hearing be [*open/closed*].

   e. Presence of child: Petitioner has requested that the child [*will/will not*] be present during the hearing.

   f. Record of the Proceedings: The school/agency is responsible for preparing a verbatim record of the proceedings.

   g. Pre-hearing Memorandum: The parties will submit a written pre-hearing memorandum setting forth the evidence they believe they will introduce to support each issue that is to be considered in the due process hearing and/or any legal authority, i.e. statutory provision, regulation, decisional law and/or agency opinion letters, that is relied upon. These memorandums are due to the hearing officer no later than 5:00 p.m. the day before the hearing and are to be faxed to my attention at [*telefacsimile number*]. [***Note***: *If parents are not represented, this should not be made a requirement*].

7. List of Witnesses and Exhibits Book: The list of witnesses and exhibits that are to be used in the hearing must be exchanged between the parties no later than five (5) calendar days before the start on the due process hearing. The deadline is [*day*], [*date*] at 5:00 p.m. Representatives for the parties are to confer and submit a joint exhibit book (three copies – one for each side and one for the hearing officer) as to those documents, which either side intends to use at the hearing and for which no objection is stated. Proposed exhibits drawing objections are to be placed in the back of the exhibit book and objections will be taken up at the hearing. Counsel for the school/agency will mail a copy of the joint exhibit book and a copy of both parties list of witnesses to the hearing officer.

If either party has any questions concerning any of the foregoing points, please call me immediately so that any uncertainty, confusion or ambiguity that might exist can be promptly addressed. You will both be given the opportunity to state any objection, correction or supplementation of this letter at the outset of the due process hearing.

Very truly yours,

____
Hearing Officer

Cc: [*Parent(s)*]
[*Special Education Director*]

Attachment E

[*Hearing Officer Letterhead*]

[*Date*]

VIA FACSIMILE (or regular mail)

[*Parent's representative*]__________
____
____
____

[*School/agency's legal counsel*]_____
____
____
____

Re: [*student's name / District, Charter School or Agency*]

Dear _______________ and _______________:

This letter will serve to confirm that the parties have settled their dispute(s) and the petitioner(s) is withdrawing the request for due process. The due process hearing set to commence on [*day*], [*date*] is vacated.

[*The letter(s) of [date(s)] between the parties detail the settlement terms.*]

OR [*the parties will confirm the terms of their agreement in a [settlement agreement] [letter of agreement] [letter from the parents] that is jointly signed by the parties, not their representatives.*]

OR [*The parties have reached an agreement through the mediation process as documented by the Agreement [minutes] of [date*]].

The school/agency should retain the original in the child's file. The parent(s) should receive either a second original or a photocopy. A photocopy of the document is to be mailed to the hearing officer and to the State Director of Exceptional Student Services, Arizona Department of Education.

Both parties are advised that should factual circumstances change in the future and either party believes that a due process issue then exists, a request for due process may be initiated.

Sincerely,

____
Hearing Officer

Cc: [*Parent(s)*]
[*Special Education Director*]
[*Due Process Coordinator, Arizona Department of Education/ Exceptional Student Services*]

Attachment F

State of Arizona
Department of Education

Lisa Graham Keegan
Superintendent of
Public Instruction

SPED 95-7

MEMORANDUM

September 2, 1994

TO: Special Education Due Process Hearing Officers

FROM: Kathryn A. Lund, PhD
State Director of Special Education

RE: 45-Day Timeline Procedures for Hearing Decisions

This memorandum is being sent to serve as a clarification of your responsibilities as a Due Process Hearing Officer in order to ensure that a hearing decision is rendered and sent to each of the parties within 45 calendar days after the receipt of the request for the hearing. This requirement is reflected both in the Individuals with Disabilities Education Act regulations (34 C.F.R. Section 300.512) and the Arizona Special Education regulations [A.A.C. R7-2-405(P)].

Please note that the 45-day time frame begins on the date that the Local Education Agency (LEA) or State Supported Institution (SSI) receives the written request pursuant to A.A.C. R7-2-405(J), not the date that you, the Hearing Officer, are assigned to the case.

Under limited circumstances, the regulations permit the Hearing Officer to extend the 45-day timeline. The Hearing Officer may grant **specific extensions of time at the request of either or both parties** [34 C.F.R. Section 300.512(c) and R7-2-405(W)]. Please note that the Regulations do not permit the Hearing Officer to extend the 45-day timeline on his/her own initiative. The Hearing Officer's authority is limited to responding to a party's request for extension. Extensions should be granted for specific time periods only, preferably for no more than 30 days.

The Arizona Department of Education is given the legal responsibility to ensure compliance with all the procedural protections contained in the law. This includes the timely issuance of Due Process Hearing Decisions. We are, therefore, asking you to complete the attached form in those cases where a request for the timeline extension is made. The completed form should be sent to both parties involved in the Hearing as well as the Department of Education, Exceptional Student Services.

KAL94323
Revised 08/96

Your full implementation of this procedure is expected and appreciated. Please be aware that other states have been ordered by the U.S. Department of Education to disqualify Hearing Officers from future appointments if there were violations of the stated timelines. (See Virginia State Department of Education IDELR 257:309 and Fairfax County School Division IDELR 257:309.) With your cooperation, we do not anticipate such a violation.

If you have any questions concerning this procedure, please contact the Due Process Hearing desk, Exceptional Student Services, at 542-3084.

KAL:cak

attachment

c: Directors of Special Education

Attachment G

FAX TRANSMITTAL

FAX NO. (602) 542-5404

DATE: ____________________ **TO FAX NO.** ____________

TO: ______________________________ **School District**
ATTN: ________________________

FROM: **Kathryn A. Lund, PhD**
State Director of Exceptional Student Services

RE: **Response to Request for Hearing Officer**

Attached you will find three names of hearing officers. These names are given in rotational order according to the ESS list of trained hearing officers. You are also provided with a vita or resume and a statement disclosing potential conflicts of interest to give you a background of information regarding these hearing officers. Once you have reviewed the three names, select a hearing officer to conduct the due process hearing, and advise the parent(s) of the person selected. Please inform us of the name of the hearing officer selected and the anticipated date of the hearing.

If objections arise, or if you should find that none of the three individuals are available, keep the materials on file and ***immediately*** request another list of three names from this office. You may continue this process until a hearing officer has been selected. This office will call the school district within five days to verify your selection.

If you request additional names, you must do so in a timely fashion. Nothing that you do can be perceived as delaying or denying the right for parents to receive due process within the prescribed timelines. Our office is obligated to carefully track, for federal reporting purposes, all due process hearing timelines.

Please submit your hearing officer choice or questions regarding the process to:

Exceptional Student Services
1535 West Jefferson
Phoenix AZ 85007
(602) 542-3084

Transmittals--Resumes of: ______________________________
____
____

The attached resumes are being forwarded to the parent.

cc: ______________________

REV. 01/30/98

DUE PROCESS HEARING

TIMELINE EXTENSION CONFIRMATION

SCHOOL DISTRICT: ______________________________

PARENT NAME: ______________________________

STUDENT NAME: ______________________________

DATE ORIGINAL 45-DAY TIME LINE EXPIRES: ____________________

DATE EXTENSION EXPIRES: *(Must include specific date of expiration)* ____________________

PARTY REQUESTING EXTENSION: ______________________________

REASONS FOR REQUEST: ______________________________

____

____

____

____

____

HEARING OFFICER DECISION (if extension granted, specify exact reason for extension):

____

____

____

____

HEARING OFFICER: ______________________________

ADDRESS: ______________________________

PHONE: ______________________________

______________________________ ____________________

Hearing Officer's Signature **Date**

Notice Sent to Parties :

☐ **Parent**

☐ **LEA**

☐ **AZ State Department of Education, Exceptional Student Services**

State of Arizona
Department of Education

DRAFT
MODEL COMPLAINT FORM ACCOMPANYMENT

Lisa Graham Keegan
Superintendent of
Public Instruction

<<NAME>>
<<ADDRESS>>
<<CITY>>, <<STATE>> <<ZIP>>

<<DATE>>

Exceptional Student Services (ESS), Arizona Department of Education is responsible for facilitating and tracking due process hearing requests. An impartial due process hearing may be initiated regarding the identification, evaluation, educational placement of a child, or the provision of a free appropriate public education (FAPE) to the child. All hearing officers for ESS are licensed attorneys and have attended Due Process Hearing Officer Training sponsored by this department.

All IDEA children and their parents have the right to due process regardless of their placement, or who made it. (34 CFR 300.500, et. Seq.; R7-2-401.) Either a school district, charter school, agency responsible for the education of individuals in their care, or any individual who has a right to represent the child in educational matters may request a hearing to challenge identification, evaluation, placement, or implementation of IEP.

You should forward the written request for due process hearing to the school district or charter school, copying other parties you wish to inform. When the department is notified, the resume or vita of three attorneys trained in special education policy will immediately be faxed to the district, charter school, or agency responsible for the education of individuals in their care and the parent(s).

Federal regulations require a due process hearing be completed within **forty-five (45) calendar** days from the receipt date of request. An impartial hearing officer will hear the case and render a decision within this time period, unless an extension is granted for good cause. An aggrieved party can appeal the decision to the Arizona Department of Education, which then forwards the request to the Arizona Office of Administrative Hearings for a procedural review by an appointed administrative law judge. After all administrative proceedings are exhausted; an aggrieved party may appeal to the appropriate federal or state court.

If you have any further questions, please do not hesitate to call me at (602) 542-3084.

Sincerely,

Patrick L. Perryman
Education Program Specialist
Exceptional Student Services

Enclosure
PLP/erw

DRAFT

MODEL COMPLAINT FORM
INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)
MAY BE USED WHEN REQUESTING A DUE PROCESS HEARING

PLEASE TYPE OR PRINT Date: ____________________

The **45** calendar days to complete a complaint will begin on the day the complaint is received by the school which is the subject of the complaint. The complaint must be in writing and may include supporting documents. A complaint may be submitted on this model form or in some other written format at the discretion of the parent(s) or their attorney.

REQUESTED INFORMATION

Complainant (Parent) or Attorney Name: ______________________________

Complainant (Parent) or Attorney Address: ______________________________

____

Complainant (Parent) or Attorney Phone: ______________________________

The best time(s) to call during normal working hours (8-5 weekdays): ______________

____

Alternate phone number(s) or preferred method of contact: ____________________

____

REQUIRED INFORMATION

Student's Name: ____

Student's Address: ____

____

Public Education Agency: ______________________________________

School Student Is Attending: ____________________________________

Provide a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem. Complainable issues under IDEA are any matter(s) relating to the identification, evaluation, educational placement, or the provision of a Free Appropriate Public Education (FAPE) to a student.*

____

____

____

____

____

____

____

____

____

____

Provide a proposed resolution of the problem(s) to the extent known and available to you.*

____

____

____

Parent Signature: ______________________________

*_**Please attach additional sheets if needed**_. _**You have the right to receive a copy of your Procedural Safeguards from the school at the time you submit your complaint.**_

Additional questions concerning this form or due process rights may be addressed by contacting:

ARIZONA DEPARTMENT OF EDUCATION
EXCEPTIONAL STUDENT SERVICES
1535 WEST JEFFERSON STREET
PHOENIX, ARIZONA 85007
(602) 542-3084 FAX 542-5404

compform2.doc 7-97

SPECIAL EDUCATION RIGHTS OF PARENTS AND CHILDREN UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)
AMENDED 1997

If your child is not currently receiving special education services, you have been given this information either because you asked that your child receive special education services or because we believe that special education services may be necessary for your child. We share your objective to assure that your child receives the free appropriate public education (FAPE) that he or she needs to benefit from the educational program. To realize this objective, we are required to evaluate your child to identify and document whether your child has any disabilities that affect his learning and, if so, to determine which special education programming and services are required. The evaluation will only be done after we have explained what we plan to do during the evaluation. We will use tests and procedures selected specifically for your child. The evaluation will not include basic tests or procedures used routinely for all students within a class, grade, or school. This evaluation will be conducted strictly according to the requirements of federal and state law and will include information from you. Following the evaluation, we will provide you with the complete results. If your child is found to be eligible for special education services, we will ask you to help us develop an individualized educational program (IEP) and identify supportive services needed by your child. You may ask others to be present at the IEP meeting, if you wish.

If your child is already receiving special education services, this information is being provided because we are arranging to review your child's IEP, or because we are planning a reevaluation of your child. This information is also provided to parents when they have requested an impartial due process hearing.

We want you to be a part of this whole process, because we believe that no one knows your child better than you do. The IDEA also provides methods to help you assure that your input is considered. In addition, IDEA establishes ways for you to object to our proposals and to have an impartial person resolve any disputes. These rights, briefly described here come from federal and state special education laws and are called the "Procedural Safeguards." The purpose of this brochure is to give you an overview of the safeguards. A fuller explanation is available from your local school district, charter school, or from the state agency where your child receives educational services. Additionally, the Arizona Department of Education, Exceptional Student Services (ADE/ESS) is also available to assist you. Their number in Tucson is (520) 628-6330; in Phoenix (602) 542-3184; and in Prescott (520) 778-6717.

Where can I get more help to understand these rights?

You should speak with your child's teacher or school principal, the director of special education or the superintendent of your school district, charter school, or state agency where your child receives educational services, if you do not understand any of these rights or procedures. You can also contact the Arizona Center for Disability Law at the numbers listed below. Other parent support groups, such as the Parent Information Network Specialists, sponsored by the Arizona Department of Education can also be contacted to help you to better understand the procedures. Ask your local school or the Arizona Department of Education for this information.

Arizona Center for Disability Law	In Tucson (520) 327-9547
	In Phoenix (602) 274-6287

WRITTEN NOTICE

What kinds of notice can I expect to receive?

There are two kinds of notice that you should expect to receive: Prior Written Notice and Procedural Safeguards Notice.

BEST COPY AVAILABLE

When should I receive Prior Written Notice?

Prior written notice must be provided to you whenever the school or agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of your child, or for the provision of a free appropriate public education to your child. This means that you will be given Prior Written Notice whenever we want to begin, change, or discontinue special education and related services to your child, or to change the schedule or conditions under which these services are being provided.

What should the Prior Written Notice tell me?

The notice will explain what we want, or refuse, to do and how the school personnel reached this decision, including a description of each test, record, or report that they used in reaching that decision. It should also include other options that were considered and why those options were rejected, and any other factors that were relevant to our decision. We will also describe the alternatives considered by school district personnel and why we chose the action that we wish to take. If this notice is not for the initial referral for evaluation, you will also be told where you can obtain another copy of this statement of your rights with sources you can contact to get help in understanding your rights.

What can I do if I do not understand the Prior Written Notice?

The notice must be written in language that is understandable to the general public. If you have trouble understanding this or any other document, please ask school personnel to explain any terms or procedures that you do not understand. You may also call the ADE/ESS or other advocacy and support group. We encourage you to ask questions until you fully understand. Your school will have copies of this information written in Spanish. We will arrange for an interpreter for parents with limited English proficiency who speak another language. If a parent is deaf or blind or has no written language, we will arrange for communication of this notice in the mode normally used by the parent (such as in sign language, Braille, or through oral communication).

What is the Procedural Safeguards Notice?

This brochure will usually serve as a notice to you of the procedures that will be used by the school or agency to ensure that your rights and those of your child are protected throughout the special education process.

When should I receive the Procedural Safeguards Notice?

A Procedural Safeguards Notice must be provided to you, at a minimum, at the following times:

1. At the initial referral for evaluation;
2. At each notification of an IEP meeting;
3. Every time your child is reevaluated; and
4. When you or the school requests due process.

What should the Procedural Safeguards Notice tell me?

The Procedural Safeguards Notice must have an explanation to you of the following rights:

- Your right to provide informed consent for evaluations, reevaluations, and initial placement, and through participation, the right to be involved in all other decisions;
- Your right to participate in all meetings dealing with the identification, evaluation, educational placement, or the provision of FAPE for your child;
- Your right to examine all records relating to your child;
- Your right to obtain an independent educational evaluation of your child;
- Your right to receive Prior Written Notice at all of the times required by law;
- Your right to request due process, to appeal unfavorable findings of the first level due process to the state level review, and to further appeal unfavorable findings through civil action with the courts, including the requirements for disclosing evaluation results and recommendati

- Your right to have your child maintained in the same placement during due process proceedings, unless you and the school agree otherwise;
- Your right to information on the procedures that the school will follow for students who are subject to placement in an interim alternative setting during any disciplinary action;
- Your right to mediation to resolve disputes when you and the school agree to use this procedure;
- Your right, in certain circumstances, to attorney's fees;
- Your right to notification that a surrogate parent will be assigned to your child whenever the parents are not known, when the school or agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State;
- Your responsibility to provide written notice to the school or agency (which shall remain
- confidential) when you request a due process hearing, or when you intend to place your child in a private school;
- Your right to be informed that the procedural safeguards right may be transferred to the student with a disability at the age of majority under state law, except for the student who has been determined to be incompetent or who has been determined not to have the ability to provide informed consent with respect to his or her educational program.

PARENT CONSENT

When is my consent required?

Your informed consent is required in four instances:

1. Before we can begin evaluating your child for the first time to determine if your child requires special education programming;
2. Before we can conduct a reevaluation of your child;
3. Before your child is placed for the first time in a special education program; and
4. Before we release any personally identifiable information about your child to any person not otherwise entitled by law to see it.

Your agreement in any of these instances must be entirely voluntary and can be revoked at any time. If you refuse to consent to these steps, and we believe that we are required to undertake them to provide your child a free appropriate public education, we must follow certain procedures. We may use mediation, if you are willing, or initiate due process to override your refusal.

Can the school or agency do things without my approval?

We can conduct a reevaluation without your consent if we can show that we took reasonable measures to obtain your consent and you did not respond. Except for the four instances outlined above, your informed consent is not required for actions regarding evaluation, placement, or the provision of a free appropriate public education. However, we will notify you of other actions we propose or refuse to take. If you disagree with a proposed action after receiving notice of it, you should call your child's principal, the director of special education, or the individual in charge of the educational program to discuss the proposed action. If we cannot agree on a proposed action, you have the right to a due process hearing by an impartial third party. Due process hearings are discussed in more detail later in this document.

PARENT PARTICIPATION

Do I have the right to participate in meetings about my child?

You, as the parents or guardians of a child with a disability, have the right and the responsibility to be involved in all aspects of the process for identification, evaluation, placement, and the provision of a free appropriate public education for your child.

ACCESS TO EDUCATIONAL RECORDS

How can I examine my child's education records?

We have established procedures both to provide you with access to your child's education records and to protect any personally identifiable information in those records. If any education record includes information on a child in addition to yours, you may examine only the information relating to your child, or be informed of the specific information. If you request, we will give you a list of the types and locations of education records used by the school or agency. We will also tell you who, if anyone, other than you and authorized school or agency personnel, has examined your child's records, the date access was given, and the purpose for which the person was authorized to use the records. We must allow you to inspect and review any education records relating to your child with respect to identification, evaluation, and educational placement of your child, and the provision of a free appropriate public education to your child. These records include any which are collected, maintained, or used by us to make decisions about your child's education. We will comply with your request to inspect or review your child's records without unnecessary delay and before any meeting regarding an IEP or any hearing relating to the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. In no case may we delay more than 45 days after your request has been made. This right of inspection includes an explanation and interpretation of these records to you by school personnel. You may also have your child's records inspected and reviewed by a representative of your choice. You may request copies of the records. However, the school or agency may charge a fee for copies that are copied for you if the fee does not effectively prevent you from exercising your right to inspect and review those records. We will presume that parents have the authority to inspect and review records relating their child unless the school or agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

How can I correct information in the records?

If, after reviewing your child's education records, you believe that they contain information that is inaccurate, misleading, or which you believe violates your child's privacy or other rights, you may ask the school or agency to change that information. We will either make those changes or reject your request for change within a reasonable period of time. If we reject your request, we will inform you of our rejection and provide information on your right to a hearing. The hearing can be held by any school or agency official or other individual who does not have a direct interest in the outcome.

Once the hearing is completed, the following procedures will be used:

If your objection is found to be justified, we will amend the information accordingly and inform you in writing.

If your objection is found not be justified, you have the right to place a statement in our records commenting on the information or giving the reasons for your disagreement with the decision. We will maintain your explanation as part of your child's records as long as we retain your child's records or any contested portion.

Will I be told when you disclose my child's records?

We must obtain your consent before allowing information to be used for a purpose other than for that which it was collected or before disclosing personally identifiable information about your child to anyone not entitled to see it under state or federal law. You can review the names and positions of school or agency personnel entitled to see personally identifiable information about your child at the location where the files are maintained. We are responsible for insuring the confidentiality of personally identifiable information about all students, as well as for providing information to you about your rights under the federal Family Education Rights and Privacy Act (FERPA) and its implementing regulations. This federal law is the primary statute protecting your privacy and that of your child.

INDEPENDENT EDUCATIONAL EVALUATION

Can my child be tested at the expense of the school or agency?

You have the right to an independent educational evaluation at public expense if you disagree with the evaluation performed or obtained by our school or agency. This evaluation is called an independent educational evaluation (IEE) and should be carried out by qualified persons who are not employed by the school or the agency. If you request information on how to obtain an IEE, we shall provide you with information where an evaluation may be obtained.

Must the school or agency always pay for an independent educational evaluation which I request?

If you request an IEE, the school or agency may initiate a due process hearing to show that its evaluation is appropriate. If the final decision is that our evaluation is appropriate, you still have the right to an independent evaluation, but not at public expense.

Must the results of the independent educational evaluation be considered by the school or agency in making decision about my child?

The school or agency must consider the results from an independent educational evaluation regardless of whether the evaluation has been completed at public or private expense.

Are there any other times when an independent educational evaluation might be required?

An impartial due process hearing officer may request an independent educational evaluation as part of a hearing. When this happens, the cost of the evaluation must be at public expense.

HOW DISPUTES ARE RESOLVED

MEDIATION

What is mediation?

Mediation is a voluntary process that brings together the parties to a dispute with a third party in an attempt to resolve the disagreement through a structured, yet informal meeting. This third party is called a mediator. This is a person who is qualified, impartial, and trained in effective mediation techniques. The state has developed a Mediation System to assist families, schools, and agencies in resolving disagreements regarding special education. The costs associated with this process are paid by the state. Mediation must be available whenever a due process hearing is requested, but may not be used to delay or deny your right to due process. Mediation can also not be used to extend the 45 day timeline set for due process hearings, unless both parties request the hearing officer to postpone the hearing, pending mediation efforts.

What kinds of disagreements can be handled through mediation?

Any dispute relating to the identification, evaluation, or education placement of your child, or the provision of a free appropriate public education to your child may be discussed and, if possible, solved through mediation?

How does mediation work?

Either party can request mediation. If all parties agree, the state should be contacted and a request made for assignment of a mediator. The mediator will then arrange for the parties to meet in sessions which are scheduled at times and in places convenient to the parties. Any agreement reached through mediation will be put into a written agreement. Discussions that occur during the mediation process are confidential and may not be used as evidence in any subsequent due process hearings or in court proceedings. The parties may [illegible]quired to sign a confidentiality pledge prior to beginning the mediation process.

Who will serve as a mediator?

The mediator will be selected from a list of individuals who are qualified mediators and who are knowledgeable about the laws and regulations relating to the provision of special education and related services.

Can I be required to use mediation?

Since this is a voluntary process, you cannot be required to participate in mediation. However, if you choose not to participate, the law permits the school or a state agency to establish procedures to require you to meet with a disinterested party from one of the parent information centers, or other appropriate alternative dispute resolution group or person. This meeting is designed to encourage the use, and explain the benefits, of the process to you and must be a time and location that is convenient to you.

How can I obtain information about mediation?

You can contact the school, agency, or the Mediation Coordinator for the Arizona Department of Education for information on the process or to request mediation.

STATE COMPIAINT PROCESS

What is the State Complaint Process?

You have the right to file a complaint with the Arizona Department of Education, Exceptional Student Section, when you believe that the school or agency is not complying with federal special education law under the Individuals with Disabilities Education Act. This complaint can deal with any aspect of the process relative to the identification, evaluation, placement, or the provision of a free appropriate public education for your child.

What do I need to do to file a complaint with the State?

Your complaint must be in writing and should include the facts related to the issue(s).

What can I expect to happen when I file a complaint with the State?

When your complaint is received by the Department, it is reviewed and an investigator is assigned. You will be notified and a copy of your complaint will be forwarded to the school or agency. You will be contacted to ensure that the investigator understands your concerns and to discuss any additional information that you believe may be relevant. Additionally, the school or agency will be contacted to discuss the procedures that will be used and to gather preliminary information that may be needed. A decision is then made as to whether the investigator will do an on-site visit or request that the school or agency submit information in writing. The Department must complete its review and give you its decision within 60 days. The decision must include findings of fact and establish a corrective action plan, if one is required. An extension of this timeline will only be made if there are extraordinary circumstances. If this occurs, all parties will be notified in writing.

What can I do if I do not agree with the findings of the State's investigation?

You have the right to ask the Secretary of Education for the U.S. Department of Education (USDOE) for a review of the State's decision.

BEST COPY AVAILABLE

DUE PROCESS SYSTEM

What is a due process hearing?

A due process hearing is the process that is used to resolve disputes between parents and schools or agencies. In this process an impartial and trained third person agrees to hear both sides of the dispute and make a decision based upon the law under the Individuals with Disabilities Education Act or under similar cases that have been settled in court. The due process hearing will be conducted in accordance with the requirements of applicable federal and state law. The decision of the hearing officer can be appealed by you or the school or the agency for review at the state level. Thereafter, both parties also have the right to file suit in state or federal court to contest any review decision.

What disputes can be brought to due process?

Disputes involving your child's identification, evaluation, placement, or the provision of a free appropriate public education (FAPE) for your child.

How do I request a due process hearing?

If you decide that you want a due process hearing, the request must be in writing to the chief administrator of the school or agency. You must provide some information along with your request for a hearing. That information includes your child's name and address, and the name of the school or program your child is attending. You must also describe the nature of the dispute and the facts relating to the problem. Further, you must propose a resolution to the problem to the extent possible at the time. You may obtain a copy of a sample form that you may use to request the hearing and provide the required information from the school, agency, or from the Department of Education. The school, agency, or the Department will provide you with information on how to obtain free or low-cost legal services, or other relevant services, if you request this information, or if a hearing is initiated by you or by the school or agency.

When is a due process hearing available?

A due process hearing may be requested by you, or by the student if he or she is at least 18 years of age but less that 22 years old. The school or agency may also request a hearing. A due process hearing may be requested because of a disagreement concerning any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child. Following are examples of some of the reasons you might seek a hearing:

1. The school or agency refuses to identify, evaluate, or appropriately serve your child.
2. The school or agency fails to consider results of an independent educational evaluation.
3. You disagree with a proposed IEP.
4. You object to termination of your child's special education program.
5. You believe our proposed placement will not meet your child's needs as stated in the IEP.
6. You believe the placement is not in the least restrictive environment to meet your child's needs.
7. You disagree with our decision about the relationship between your child's disability and the behavior which resulted in disciplinary action.
8. You disagree with our intent to graduate your child.

Who will conduct the hearing?

The hearing is conducted by a person known as an impartial hearing officer. This person has the responsibility to assure that proper procedures are followed and that rights of the parties are protected. An impartial hearing officer shall be:

1. unbiased - not prejudiced for or against any party in the hearing;
2. disinterested - not having any personal or professional interest which would conflict with his/her objectivity in the hearing;
3. independent - may not be an officer, employee, or agency of the school, agency, the Department of Education, or any other public agency involved in the education or care of the child. A person who otherwise qualifies to conduct a hearing is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer;
4. trained by the Department of Education as to state and federal laws and regulations relating to the identification, evaluation, placement, and education of children with disabilities.

How long will a due process hearing decision take?

The hearing must be conducted and a copy of the hearing officer's decision must be delivered to both parties no later than 45 days after the hearing was requested. However, this timeline may be extended if the hearing officer grants a specific extension of time following the request of either party. The hearing officer must reach a decision and deliver a copy of written or, at your option, electronic findings of fact and decisions to each of the parties. The Department of Education, after removing any personally identifiable information, will transmit the findings and decision to the Special Education Advisory Committee and make them available to the general public. If the school or agency or you do not take any further action, the due process hearing decision is final.

What procedures will be followed during the hearing?

The hearing officer shall preside at the hearing and shall conduct the proceedings in a fair and impartial manner to ensure that all parties involved have an opportunity to:

1. present their evidence and confront, cross-examine, and compel the attendance of witnesses;
2. prohibit the introduction at the hearing of any evidence or evaluations completed by that date with recommendations that have not been disclosed to all parties at least five days before the hearing, if the party intends to use that information in the hearing;
3. produce outside expert witnesses, be represented by legal counsel and by individuals with special knowledge or training with respect to problems of children with disabilities.

What are my rights during a due process hearing?

The due process hearing will be conducted at a time and place that is convenient to you and to your child, who may be present if you wish. The hearing officer will open the hearing to the public at your request, otherwise, the hearing is closed to the public. In cases where there are language differences, an interpreter shall be provided for you. You have all of the rights in the procedures noted above. At the conclusion of the hearing, either party or its representative(s) has the right to obtain a written or, or at your option, electronic verbatim record of the hearing.

Can the due process decision be appealed?

Both you and the school or agency can appeal the due process hearing decision to a review officer, who must meet the same impartiality requirements required for local or first level hearing officers. The request for an appeal must be made within 30 days after receiving the decision of the hearing officer.

What happens during a review hearing?

The Executive Director of the Office of Administrative Hearings will assign an Administrative Law Judge to serve as the review officer. The review officer will examine the entire first level hearing record, insure that required procedures were followed, and make an independent decision. The review officer may take additional evidence if he or she believes it is necessary, and may allow the parties an opportunity for additional argument in person or in writing. If the review officer allows additiona[illegible]ument, it will be

BEST COPY AVAILABLE

conducted at a time and place that is convenient to you and your child, who may be present if you wish.

How long will a review decision take?

The review officer must reach a decision and deliver a copy of the written or, at your option, electronic findings of fact and decisions to each of the parties within 30 days after the request for a review is made. This date may only be delayed if the review officer grants a specific extension of time following the request of either party. If neither party appeals the decision, it is final. After any personally identifiable information is deleted, a copy of the findings and decisions will be transmitted to the Special Education Advisory Committee, and made available to the general public.

Can I appeal to the state or federal court?

The review officer's decision is final unless either party files a civil action. You and the school or agency have the right to appeal any review decision to the appropriate state or federal court.

Can I be awarded attorney's fees?

You may be awarded attorney's fees by the court if you prevail on a substantial number of the issues in a particular hearing. You can substantially prevail without winning everything that you want from the school or agency. You may also be awarded attorney's fees if the court finds that the school or agency unnecessarily drew out the final resolution of the action or proceedings or if there was a violation of this section. Fees awarded shall be based on rates prevailing in the community in which the action or proceedings arose for the kind and quality of services furnished, and are not subject to the use of a bonus or multiplier. You cannot be awarded attorney's fees for IEP meetings or for mediation, unless the meeting is ordered as a result of an administrative proceeding or judicial action. Attorney's fees may be reduced if you unreasonably draw out the final resolution, if your attorney's fees exceed the prevailing hourly rate, if the time spent by the attorney and the legal services furnished were excessive, or if your attorney failed to provide appropriate information to the school or agency. Whether you are entitled to attorney's fees can be a difficult determination and must be made by a court, not by the hearing or review officers.

Where will my child be placed during the due process hearing, review, or court action?

In general, unless we both agree otherwise, we cannot change your child's placement as it existed on the day you ask for a due process hearing until the completion of all legal proceedings. If your child is entering public school for the first time, the law requires that, if you agree, we place him or her in the public school program that he or she would otherwise be entitled to attend, until any hearings or court proceedings are concluded, unless we both agree to a different placement.

There are some exceptions to this general rule. These exceptions occur when your child is placed in what is called an "interim alternative educational setting" (IAES). This setting is different from the placement where he or she is currently receiving educational services, (See the section of "Placement in Interim Alternative Educational Settings.") You can request a hearing to challenge the decisions that led to this interim placement. If you request such a hearing, your child will remain in the interim setting, unless we agree otherwise, until the hearing officer has made a decision or until the time period for the interim placement expires, whichever is sooner. If the interim placement has expired, and the school or agency then proposes to change your child's placement, you can also request a hearing to challenge the placement the school or agency proposes. If this occurs, your child will remain in the placement he or she was in prior to the removal to the interim setting. This is referred to as the current placement in IDEA. If the school or agency believes it is dangerous for your child to be in the current placement, we can request an expedited hearing to place your child in an appropriate interim alternative educational setting while the placement dispute is resolved.

Can my child with a disability be reported to law enforcement authorities?

Nothing in these provisions prohibits the school or agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents state law enforcement and judicial authorities from exercising their responsibilities under state and federal law.

DISCIPLINE PROCEDURES

Are you ever permitted to remove my child with a disability from his placement?

We are permitted, under law, to remove your child from his or her current placement under certain circumstances. School personnel can place your child in an appropriate interim alternative educational setting, another setting, or to suspend your child for not more than 10 consecutive or cumulative school days, if this is the policy we have for all students.

We can place your child in an appropriate interim alternative educational setting for up to 45 days if he or she carries a weapon to school or to a school function. We can also make an interim placement for up to 45 days if your child knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance while at school or at a school function. A hearing officer can also order your child placed in an appropriate interim alternative educational setting under certain circumstances if the school district demonstrates by substantial evidence that maintaining the current placement is substantially likely to result in injury to your child or to others. Before making such an interim placement, the hearing officer must consider the appropriateness of your child's current placement, and whether the school district made reasonable efforts to minimize the risk of harm.

Either before, or not later than 10 days after taking a disciplinary action that results in the removal of your child from his or her current placement, we must take certain actions. If we have not previously conducted a functional behavioral assessment and implemented a behavior intervention plan, we must convene an IEP meeting to develop an assessment plan to address the behavior. If your child already had a behavioral intervention plan, the IEP team must review the plan and modify it as necessary to address the behavior,

What can I expect when an interim alternative educational placement is ordered?

An interim alternative educational placement ordered by the school or the agency or by a hearing officer must provide for certain things. First, the setting must enable your child to continue to participate in the general curriculum and to continue to receive those services and modification, including those described in your child's current IEP, that will enable your child to meet the goals set in his or her IEP. The interim placement must also include services and modifications designed to address the behavior that resulted in the disciplinary action so that it does not recur.

What must the school or agency do if they intend to place my child with a disability in an interim alternative educational placement for more than 10 school days?

We must first notify you of the decision to make this interim placement no later than the date on which the decision is made. The notification of our decision must include this statement of your rights. Then immediately, if possible, but no later than 10 days after we make a decision to remove your child to an interim placement, we must review the relationship between your child's disability and the behavior that resulted in the disciplinary action. The review of the relationship between the disability and the behavior must be conducted by the IEP team, which includes you and other qualified personnel.

How do we decide if there is a relationship between my child's disability and the behavior that led to disciplinary action?

In determining whether the behavior of your child is a manifestation of his or her disability, certain things must be considered by the IEP team. We must consider all relevant information, [illegible]ing information you provide and any evaluations or diagnostic testing we conduct. We must also consider observations and the appropriateness of his or her current IEP and placement. We can only decide that the behavior is not a manifestation of your child's disability if the following are true:

1. We conclude that your child's IEP and placement were appropriate and were being provided as described in the IEP;
2. We conclude that your child's disability did not impair his or her ability to understand the impact and consequences of the behavior; and
3. Your child's disability did not impair his or her ability to control the behavior.

What happens if my child's behavior is determined not to be a manifestation of his or her disability?

If your child's behavior is determined not to be a manifestation of his or her disability, disciplinary procedures that are used with children without disabilities can be used. However, even if your child is suspended from school for more than 10 days or expelled from school, we must continue to provide him or her with a free appropriate public education. If you disagree with the determination that your child's behavior is not a manifestation of the child's disability or with any decision regarding placement, you may request a hearing. If you so request, this hearing can be expedited.

What protection does my child have if he or she has not been identified as being a child with a disability?

A child who has not been determined to be eligible for special education and related services, who has engaged in behavior that violates any rule or code of conduct of the school or agency, may claim any of the disciplinary protections if the school or agency had knowledge that the child had a disability before the behavior occurred. The school or agency is determined to have knowledge if:

1. You, as the parent, expressed your concerns that the child needed special education and related services, in writing;
2. The child's behavior or performance demonstrates the need for such services;
3. You requested an evaluation of the child; or
4. The teacher or other school or agency personnel expressed concern about the behavior or performance of the child to the director of special education or other school or agency personnel.

UNILATERAL PLACEMENT OF CHILDREN BYPARENTS IN PRIVATE SCHOOLS AT PUBLIC EXPENSE

Can I place my child in a private school and expect the public school to pay for the placement?

We do not have to pay for the cost of an education, including special education and related services, of a child with a disability at a private school or facility if we make a free appropriate public education available to your child, and you elect to place your child in a private school or facility. However, we may be required to reimburse you for the cost of that enrollment under certain circumstances.

Under what circumstances can I be reimbursed for the cost of enrolling my child in a private school?

These reimbursement provisions applies only if your child previously received special education and related services under the authority of a public agency, and you enrolled your child in a private elementary or secondary school or facility without our consent or referral. Under these circumstances, reimbursement can be ordered if a court or hearing officer finds that we did not make a free appropriate public education available to your child in a timely manner before you enrolled your child in the private school or facility.

Why would I be denied the cost of reimbursement?

A court or hearing officer may reduce or deny the cost of the reimbursement if you have not complied with the requirement to inform the school or agency of your intention to place your child in a private school. This requirement can be fulfilled in one of two ways. First, at the most recent IEP meeting you attended prior to removing your child to a private school, you can inform the IEP team that you reject the placement proposed by the district, state your concern, and state your intention to enroll your child in a private school at public expense. Or, you can give written notice of this information to the school or agency at least 10 business days (including holidays that occur on a business day) prior to removing your child from the public school. Reimbursement may not be reduced or denied for failure to provide this notice if a parent is illiterate or cannot write in English, if reducing or denying reimbursement would likely result in physical or serious emotional harm to your child, if the school or agency prevented you from providing such notice, or if you were not informed that you must provide this notice to the school or agency.

Reimbursement may also be reduced or denied if we provided written notice of our intent to evaluate your child (including a statement of the purpose of the evaluation that was appropriate and reasonable) prior to the child's removal from the public school, and you did not make your child available for such an evaluation. Reimbursement may also be reduced or denied if a court finds that actions taken by you were unreasonable.

Finally, it is important that you understand all of these rights. Make sure that you ask questions until you understand all of the procedures to which you and your child are entitled.

WORKING DRAFT

BEST COPY AVAILABLE